FILED
JUN 23 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

342 U.S.
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ALA-A

No. 140

ALABAMA MARBLE COMPANY, a Corporation,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

JOHN J. SMITH,
Birmingham, Alabama,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit.

To the Honorable, the Chief Justice, Fred M. Vinson, and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. Petitioner, an Alabama corporation having its principal office and place of business at Gantt's

Quarry, Alabama, has been and is now engaged in the marble and marble by-products business. Petitioner admits that, at all times pertinent, it was engaged in commerce and that its business affected commerce within the meaning of the NATIONAL LABOR RELATIONS ACT, as amended (61 Stat. 136, 29 U. S. C., *Supp. III*, Secs. 151 *et seq.)*, herein referred to as the Act. (Also, see R.[1] 33-34, 56, 139-140.)

2. For more than forty (40) years, without interruption, petitioner has conducted its business at Gantt's Quarry, Alabama. (ABR.[2] 166-167.) There has been no "anti-union animus" (*International Union, U. A. W., A. F. L., Local 232 v. Wisconsin Employment Relations Board, et al.*, 1949, 69 Sup. Ct. 516) on the part of the petitioner.

On October 4, 1946, the National Labor Relations Board (herein called "Board") certified the American Federation of Labor as the collective bargaining agent for all of petitioner's employees, including watchmen, but excluding office and clerical employees, draftsmen, executives and supervisory employees. (*In the Matter of Alabama Marble Company, Employer, and American Federation of Labor, Petitioner*, 1946, 71 N. L. R. B. 275, No. 31.) Following such certification petitioner and International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers, and

[1] R. is used to designate the certified TRANSCRIPT OF RECORD filed herein.
[2] ABR. is used to designate the certified APPENDIX TO BRIEF FOR RESPONDENT filed herein.

Terrazzo Workers Helpers, A. F. L., Local 133, (said Unions, separately and severally, herein called "Union") negotiated and signed a collective bargaining agreement (herein called "contract") effective during the period from November 7, 1946, through November 7, 1947, "and thereafter from year to year until either party shall give to the other party 30 days written notice prior to any anniversary day of this agreement for a desire of change or termination." Petitioner instructed its foremen to comply with the provisions of the contract (ABR. 106). From time to time petitioner's representatives met with representatives of the Union, considered, adjusted and settled all grievances (ABR. 29, 30, 60, 77-78). As found by the Trial Examiner: "The respondent (petitioner here), as of October (1947), had not committed any unfair labor practice." (R. 149.)

3. The contract between petitioner and Union was effective at all times pertinent. (R. 210-214.) Expressly (Section 1. A., ABR. 211) petitioner was "vested exclusively with the management of the business, including the right to . . . discipline, and discharge for just cause." The contract required reinstatement without loss of seniority and with full pay for time lost in the case of any employee unjustly discharged. (Article 5E, ABR. 214.) Lock-outs, slowdowns and work-stoppages were precluded "until after *all* the provisions of the grievance procedure have been complied with." (Section 1 C, ABR. 211-212.) A specific procedure was established for the handling of grievances (Article 5, ABR. 212-214)

which required arbitration (Sec. 4, ABR. 213) and made final and binding on petitioner and Union the decision of the arbitrators. Also, such grievance procedure provided for monthly meetings (Article 5 C, ABR. 213), required petitioner to pay Grievance Committeemen for time spent during their regular working hours attending meetings and required members of the Grievance Committee to get certain permission before leaving their departments to go to any other department to handle a grievance. (Article 5 D, ABR. 213-214.)

4. During the effective period of the contract, that is, on June 23, 1947, the *LABOR MANAGEMENT RELATIONS ACT, 1947,* (61 Stat. 136, 29 U. S. C., *Supp. III,* Secs. 141 *et seq.*, 29 U. S. C. A., Pocket Part, *Secs.* 141 *et seq.)* was enacted. It amended the *NATIONAL LABOR RELATIONS ACT.*

Petitioner and Union desired to change the contract. On September 2, 1947, the petitioner sent the Union notice that it did not wish the contract to continue beyond its expiration date. Copies of this letter were sent to the Board and Federal Mediation and Conciliation Service. On September 7, 1947, the Union sent the petitioner a notice giving the required sixty (60) day notice of its intention to reopen the contract. On October 2, 1947, the petitioner sent notice to the Federal Mediation and Conciliation Service that no agreement had yet been reached as to the provisions of a new contract. On October 6, 1947, the Union sent a similar notice to the Federal Mediation and

Conciliation Service. (R. 154, ABR. 99, 100, 107-112.) Thus both petitioner and Union gave the notices required by Section 8 (d) of the Act.

5. The first work stoppage in petitioner's history (ABR. 28, 166, 167) occurred on Friday, October 3, 1947, when nine (9) handpolishers, without permission, absented themselves from work during the afternoon work period to listen to a radio broadcast of a World Series baseball game. (ABR. 168-173.) The nine (9) handpolishers were *not summarily* disciplined. This incident was investigated over a three day period by petitioner's Assistant General Manager, H. M. King, after it became known to him. King was in charge of production and production personnel. (ABR. 194.) Having considered the information obtained, King reached a decision, namely, to discharge *anyone* who had wilfully absented himself from work without permission during the afternoon work period on Friday, October 3, 1947. King sent his decision to all production foremen and the nine (9) handpolishers were discharged when they reported for work on Monday, October 6, 1947.

Petitioner's business was and is departmentalized. Particular foremen were in charge of particular departments and only had authority over employees in the particular departments over which they were foremen. (ABR. 212-214, which recites Article 5 of the contract.) Petitioner's foremen "could on their own responsibility fire a man for insubordination, that is, flatly refusing to obey orders, and then in the

case of a foreman being cursed out by a man under him." (ABR. 200, 201-202.) King handled all other matters requiring disciplinary action. Such was the known custom and practice. (ABR. 200, 201-202, R. 272-284.)

The discharges of the nine (9) handpolishers were handled according to the contract grievance procedure at meetings on October 11, 1947, and October 15, 1947. During the meeting on October 15, 1947, petitioner offered to return eight (8) of the handpolishers to work the next day without loss of seniority, offered to pay one (1) handpolisher (Teel) for working time lost, and refused to rehire one (1) handpolisher, namely, Aubrey Ellison. (ABR. 88-92, 150-156, 180-182, 189-193.) As requested by the Union, the petitioner reduced its position to writing (ABR. 215-220). The Union refused petitioner's proposal and the parties agree to arbitrate these grievances. Petitioner was ready, able, and willing, at all times, to arbitrate these matters but such was precluded by the Union. (R. 148, footnote 7, insofar as findings of fact are stated.)

6. On Monday, October 6, 1947, the nine (9) handpolishers were discharged when they reported for work. (ABR. 172-173.) A complete work stoppage in petitioner's production operations (quarry, mill, crusher, finishing plant) occurred on and lasted throughout Monday, October 6, 1947. (R. 144.) King learned of the work stoppage about 7:45 A. M. when Harrison, a son of one of petitioner's officers and

a non-supervisory employee, (ABR. 175), came to his home and told him that none of the men in the finishing plant were at work except those at the rubbing beds, that men were massing around those working on the rubbing beds (Negroes—ABR. 130) and that there might be trouble. King told Harrison "to go back and tell E. I. Dison, foreman of the rubbing beds, to shut the beds down." (R. 144, ABR. 173-175.) King was available throughout the day but did not go to the production area. (R. 144, ABR. 174.) There is no dispute about the fact that King was petitioner's representative to whom all grievances had been and were to be presented. (ABR. 29-30, 77-78, 102-103.) The custom and practice was to contact King and arrange for a meeting. (ABR. 77-78.) The Union admitted that it should have contacted King, but did not. (ABR. 33, 102-103.) King's assistant, W. H. Runge, Jr., (ABR. 136) was out of town on business. (ABR. 177.) Also, W. H. Runge, Sr., petitioner's General Manager, was out of town on business. (ABR. 177.) Mitchell, an A. F. of L. organizer and a representative of the Union, stated that he was sorry the work stoppage had occurred, that he did not then know the circumstances or details, had made no investigation, that the strike had not been authorized by the Union, that the Union would live up to its contract and order the men back to work. (ABR. 86.) King told Mitchell that he resented the whole affair, that the men had acted in cold disregard of the welfare and interest of the petitioner, that their acts were those of gross insubordination, that they had defied the petitioner, that they had violated the contract.

(ABR. 178.) Mitchell then proposed that all employees, including the nine (9) discharged handpolishers, should return to work the next morning, that the discharge of the nine (9) handpolishers should be handled as grievances under the contract, that the handpolishers, if found guilty under the grievance procedure, could then be fired by petitioner, which would have the advantage of their services in the meantime. Also, Mitchell reminded King that the contract provided that a discharged employee returned to work would be entitled to back pay for work time lost. (ABR. 87.) King *told* Mitchell that everyone except the nine (9) discharged handpolishers could return to work the next morning. (ABR. 178.) It was then agreed that the cases of the nine discharged handpolishers would be handled as grievances under the provisions of the contract. (ABR. 178, 179.) The next morning, Tuesday, October 8, 1947, petitioner's employees, except the nine discharged handpolishers, returned to work.

After the complete work stoppage on October 6, 1947, King's time and thought were taken up with the details of arranging the work and getting the plant back into production. (ABR. 203.) During the latter part of the week of October 6, 1947, King received his first specific information regarding the role or part taken by any individual employee in connection with the complete work stoppage on Monday, October 6, 1947. (ABR. 183.) King completed his investigation on October 14, 1947. On October 15, 1947, because of the newness, seriousness and importance

of the decision to be made in connection with those responsible for the work stoppage on Friday afternoon, October 3, 1947, and the complete work stoppage on Monday, October 6, 1947, he met with petitioner's directors and together they reviewed the cases of the nine discharged handpolishers and the cases of the four individuals who filed charges against petitioner with the National Labor Relations Board, namely, Charles T. Adair, (Case No. 10-CA-86, R. 13-15), W. A. Wilson, (Case No. 10-CA-87, R. 16-17), W. A. Adams, (Case No. 10-CA-88, R. 18-19), C. M. Kinser, (Case No. 10-CA-93, R. 20-22). Collectively the directors reached a decision. (ABR. 182-190, 195-199, 202-204, 205-207, 223-227, 136-144.) Petitioner's decision regarding the nine discharged handpolishers has already been stated. (See paragraph 5 hereinabove.) Petitioner's decision was to discharge the said Charles T. Adair, W. A. Wilson, W. A. Adams and C. M. Kinser, and each was discharged on Thursday, October 16, 1947, after each had worked seven (7) days (ABR. 82, 181), for causing or provoking the complete work stoppage in petitioner's production operations on Monday morning, October 6, 1947, in disregard of the welfare of fellow workers and interest of petitioner and in violation of the contract between petitioner and the Union. (R. 146.) At the evening meeting with representatives of the Union on October 15, 1947, King told the Union that Ellison's behavior "does warrant us in discharging him." (ABR. 157-158.) Petitioner treated and considered Adair, Wilson, Adams and Kinser in the same category as Ellison and believed that their misconduct warranted petitioner in dis-

charging them. (ABR. 158.) Union representative Mitchell during the meeting on October 22, 1947, stated that Adair, Wilson, Adams and Kinser "were discharged because they did not agree with Mr. Smith and with the company on its proposal to reinstate part of the nine handpolishers and leave one out." (ABR. 95.)

As found by the Trial Examiner Adair, Wilson, Adams and Kinser held positions in the Union. Kinser was its president, Adair was secretary and treasurer, and Wilson and Adams were committeemen. (R. 141.) Other committemen, namely, Joe Kirk and Douglas Robinson, were not discharged. (ABR. 78.) The particular willful misconduct of Adair, Wilson, Adams and Kinser is detailed in RESPONDENT'S STATEMENT OF CITATION FROM THE RECORD filed with the Board and is undisputed by the Board. (R. 244-246, which by reference are incorporated herein as though set out verbatim.) Petitioner posted a statement setting forth the facts regarding the nine (9) discharged handpolishers and the said Charles T. Adair, W. A. Wilson, W. A. Adams and C. M. Kinser. (ABR. 227-230.)

The discharges of Adair, Wilson, Adams and Kinser were handled as grievances under the contract at the meeting held on October 22, 1947. (ABR. 104.) Petitioner and Union waived technical compliance with steps 1 and 2 of the grievance procedure (ABR. 164) contained in the contract. Petitioner and Union then prepared written statements naming their respective

arbitrators and exchanged these statements. (ABR. 97-98.) The Union failed, refused, or precluded the arbitration of the cases of Adair, Wilson, Adams and Kinser, even though it was called upon several times by the petitioner to proceed. (ABR. 161-165, 104-105.)

7. On the basis of the charges filed by Adair, Wilson, Adams and Kinser (R. 13-22), the Board issued a complaint, dated March 24, 1948, against the petitioner, alleging that petitioner had engaged in and was engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act, as amended (R. 22-26), and on the same date issued an order consolidating the cases of these four (4) individuals for hearing. (R. 26-27.)

On May 25, 1948, the Board issued a complaint against petitioner (R. 32-40) based on a charge (R. 47-49) dated February 6, 1948, and an amended charge (R. 29-32) dated March 3, 1948, signed by Walter L. Mitchell, organizer, A. F. of L., before a Board agent, alleging that petitioner had refused to bargain with the Union commencing on or about September 6, 1947, had provoked (R. 35-38) an unfair labor practice strike commencing on or about November 8, 1947, (R. 36-38), had discriminated against John T. Stewart and Rex Gordon Stewart by refusing to rehire each of them following the alleged unfair labor practice strike which began on November 8, 1947, and lasted until December 12, 1947, because of their membership in and activities on behalf of the Union

and because they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection. (R. 37.) Each of these matters was decided in favor of the petitioner (Intermediate Report, R. 135-221 and Board's decision and order dated June 6, 1949, R. 125-134) and are not now before the Court. However, the following statement, finding or conclusion was made by the Trial Examiner and concurred in by the Board: "While Union leaders were discharged, the circumstances under which they were released do not indicate that respondent was motivated by a desire to weaken the Union's position at the bargaining table, to destroy its majority, or to avoid the respondent's obligation to bargain." (R. 173.)

Petitioner bargained with the Union at meetings held on the following dates in 1947, namely, September 17, September 26, October 22, October 30, November 6, November 28, and December 23. (R. 154-155.)

On May 26, 1948, an order was issued consolidating the cases of the individual complainants with that based on the charge filed by the Union. (R. 41-42.) Petitioner filed a motion to sever the cases of the individual complainants (R. 52-53) and a separate motion to dismiss each such case (R. 50-51), and a separate motion to strike from each such cases paragraph 4 (R. 60-65) of the complaint based on the charges of the four individual complainants. Petitioner through its answers challenged the Union's compliance with Section 9 (f), (g) and (h) of the

Labor Management Relations Act, 1947, and demanded strict proof thereof. The Court's attention is called to the fact that the record contains nothing to show that the Union had complied with such provisions. Petitioner further alleged the discharge of Adair, Wilson, Adams and Kinser had been handled as a grievance under steps 1, 2 and 3 of the grievance procedure, that petitioner and Union had agreed to arbitrate such matters and had designated their respective arbitrators, that the discharges of the four said individuals were not arbitrated, because of the refusal, neglect or failure of the Union to proceed. Also, petitioner answered that each individual complainant (Adair, Wilson, Adams and Kinser) was promptly discharged for good cause after petitioner had knowledge of the particular conduct of each such individual complainant and had satisfied itself as to the guilt of each such individual complainant. (R. 62.) Petitioner answered that it was engaged in commerce but averred that it was without knowledge regarding the averment that such had a close, intimate relation to commerce. (R. 63.)

Petitioner filed a motion to dismiss the complaint in Case No. 10-CA-85. (R. 81-83.) Also, petitioner filed a motion to sever (R. 78-81) Cases No. 10-CA-86 (Adair), 10-CA-87 (Wilson), 10-CA-88 (Adams), 10-CA-93 (Kinser), and 10-CA-85 (Union). Then petitioner filed its answer to the complaint issued in Case No. 10-CA-185, which was issued because of the aforesaid charge and amended charge filed by the Union.

(R. 66-76.) Petitioner answered that it was engaged in commerce, challenged the Union's compliance with Section 9 (f), (g) and (h) of the Labor Management Relations Act of 1947, and demanded strict proof thereof, that the discharges of Adair, Wilson Adams and Kinser had not been handled under the grievance procedure through arbitration as provided in the contract because of the refusal, neglect or failure of the Union to proceed, that it had promptly discharged Adair, Wilson, Adams and Kinser for good cause after it had knowledge of their respective conduct on October 6, 1947, and had satisfied itself as to the guilt of each such person, challenged the averment that the Union represented its employees for the purpose of collective bargaining and averred that it had received from the Board "a petition for decertification of representatives" (N. L. R. B., Atlanta, Georgia, No. 10-RD-5), that it had filed with the Board, at Atlanta, Georgia, its petition for the "certification of represenatives", averred facts showing that it had bargained collectively, denied the allegations that it had caused and prolonged an unfair labor practice strike, averred that John T. Stewart was a supervisory employee within the meaning of the Act, that petitioner had no need for the services of Rex Gordon Stewart, denied any unfair labor practices in connection with any of its employees. At the close of the hearing petitioner again moved to dismiss the complaint in each case. (R. 139.)

Each of petitioner's aforesaid motions were overruled by the Trial Examiner. The complaint based

on the charges of the four individual complainants and the complaint based on the charges filed by the Union were consolidated for hearing and heard together by a Trial Examiner of the Board during the period beginning June 8, 1948, and ending June 25, 1948. (R. 138.)

8. The Trial Examiner found and concluded that petitioner had violated Section 8 (a) (1) and (3) of the Act and recommended that petitioner cease and desist therefrom, that petitioner reinstate and make whole Charles T. Adair, W. A. Wilson, W. A. Adams, C. M. Kinser, and post for 60 days a notice to its employees. (R. 135-221.) Petitioner was absolved of all other charges of unfair labor practices. (R. 184-188.)

The Trial Examiner concluded that the work stoppage on October 6, 1947, was directed by Union leaders and supported by Union members, constituted concerted activities within the Act and subjected the participants therein and their leaders to disciplinary action because it was in violation of a contractual obligation. (R. 148-149.) Further, the Trial Examiner conculded that the employee status of the strikers was not automatically severed but that affirmative and timely action by the petitioner was required. Also, the Trial Examiner held that "the agreement (on October 6, 1947) that all strikers could return to work constituted a disposition of the matter of disciplining the strikers for their strike activity" (R. 151), that such agreement "plus the actual return to work, in-

cluding the four complainants, the failure to . . . to initiate any action for several days and . . . failure to take final action against the four former strikers until 10 days after the work stoppage, all constituted condonation of their strike activities," (R. 151) that petitioner "was under an obligaion to take affirmative action against any strikers, or at least, effectively reserve that right," (R. 151.) Then the Trial Examiner said:

> "The use of the method of discharges as a penalty for engaging in activity protected under the Act has been recognized as a discrimination which 'goes to the very heart of the Act.' The scope of the illegal conduct discloses a purpose to defeat self organization among the employees. Such conduct reflects a determination generally to interfere with, restrain and coerce the employees in the exercise of the right of self-organization, to form, to join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and presents a ready and effective means of destroying self-organization among the employees." (R. 183-184.)

9. Petitioner duly filed with the Board its exceptions to the findings, conclusions, rulings, decisions and recommendations of the Trial Examiner, (R. 103-124) and a brief in support thereof. Also, petitioner requested oral argument before the Board and this request was denied. (R. 126, footnote 1.) Counsel for the General Counsel filed exceptions to the said INTERMEDIATE REPORT (R. 98-102) and a brief in support thereof.

10. On June 6, 1949, the Board issued its DECISION AND ORDER (R. 125-134), affirming the rulings of the Trial Examiner. The Board further held that petitioner "waived or condoned such conduct (that of Adair, Wilson, Adams, Kinser in connection with the work stoppage on October 6, 1947) by permitting them to return to work." (R. 126, 127); that petitioner knew that the employees had engaged in a work stoppage in breach of contract, yet "agreed to permit all employees to return to work without stipulating that it reserved to itself the privilege of disciplining any participant in the work stoppage." (R. 127.) Also, the Board held:

> "In any event, the Respondent's foremen had personal knowledge of the part played by the four union officers in the work stoppage at the time it occurred, and we attribute such knowledge to the Respondent." (R. 127.)

Further the Board held:

> "We further find that Respondent discharged these four employees and failed and refused to reinstate them because of their concerted activities, thereby interfering with, coercing, and restraining the employees in the exercise of the rights guaranteed by Section 7 of the Act, in violation of Section 8 (a) (1) thereof. Whether the Respondent's discriminatory conduct be viewed as violative of Section 8 (a) (3) or Section 8 (a) (1), effectuation of the policies of the Act requires that the four employees be reinstated with back pay." (R. 127.)

11. Petitioner next filed its MOTION OR PETITION FOR RECONSIDERATION, ETC. (R. 221-232) each and every part of which is now referred to and incorporated herein, with the same force and effect as if herein set out in full. Again petitioner, for substantial reasons, petitioned the Board for permission to argue orally its MOTION OR PETITION FOR RECONSIDERATION, ETC. (R. 233-235.) Each and every ground in said petition for oral argument is now referred to and incorporated herein, with the same force and effect as if herein set out in full.

By order dated July 20, 1949, the Board ordered the petitioner to supply a statement of citations from the record in the case (R. 236-237), and petitioner complied. (R. 241-251.) Petitioner now refers to each and every numbered item in its STATEMENT OF CITATION FROM THE RECORD and incorporates each herein, with the same force and effect as if herein set out in full.

On August 26, 1949, the Board entered its order (R. 252-257) denying petitioner's MOTION OR PETITION FOR RECONSIDERATION and petitioner's REQUEST FOR PERMISSION TO ARGUE ORALLY, ETC. The petitioner then filed its MOTION TO SET ASIDE OR VACATE THE ORDER DENYING PETITION FOR RECONSIDERATION OF BOARD'S DECISION AND TO REOPEN, ETC., which was supported by six affidavits (R. 258-267, 272-284), and a separate MOTION TO REOPEN AND SET FOR FURTHER HEARING, which, also, was supported by six

affidavits (R. 267-284), and petitioner now refers to each of these said motions and incorporates each herein, with the same force and effect as if herein set out in full. On October 21, 1949, the Board entered an order denying these motions (R. 285-286).

12. Petitioner's exceptions filed to the INTERMEDIATE REPORT and its aforesaid motions filed in connection with the order of the Board dated June 6, 1949, and its STATEMENT OF CITATION FROM THE RECORD challenge all findings of fact, conclusions of law, recommendations, decisions or rulings of the Trial Examiner and the Board as being contrary to the preponderance or substantial evidence on the record considered as a whole and contrary to the policy and express provisions of the Act, and contrary to the applicable law.

13. On February 3, 1950, the Board filed in the United States Court of Appeals for the Fifth Circuit its petition for enforcement against the petitioner herein of its aforesaid order dated June 6, 1949. (R. 1-7.) On the same date the Court ordered the Board's petition filed and the case docketed as of February 3, 1950, and, further ordered that the petitioner, respondent below, be given notice upon the filing by the Board of a certified copy of the transcript of the proceedings in said matters. (R. 8-9.) On February 3, 1950, the Board duly filed a certified transcript of the record of the proceeding had before the Board. (R. 9-13.) In the United States Court of Appeals for the Fifth Circuit the cause was docketed as N. L. R. B.,

Petitioner, *versus* ALABAMA MARBLE COMPANY, Respondent, NO. 13111.

On January 8, 1951, said cause was argued and submitted to the Court, Circuit Judges E. R. Holmes, Wayne G. Borah, Robert L. Russell, sitting. (R. 287.)

On January 16, 1951, Alabama Marble Company filed a supplemental brief in order to make certain additional comments to the Court which it was impossible to make within the twenty (20) minutes allotted by the Court for argument. On January 22, 1951, a *per curiam* opinion was entered granting the Board's petition to enforce its order dated June 6, 1949, against Alabama Marble Company, respondent below and petitioner herein. (R. 287.) The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 22, 1951, and the pertinent language therein contained is:

> "It is now here ordered, adjudged and decreed by this Court that the petition to enforce the order of the said National Labor Relations Board in this cause be, and the same is hereby granted." (R. 288.)

This judgment of the United States Court of Appeals for the Fifth Circuit is reported in 185 F. 2d. 1022.

On February 9, 1951, Alabama Marble Company, respondent below and petitioner herein, filed a PETITION FOR REHEARING and, in the alternative, a MOTION TO AMEND JUDGMENT. (R. 289-297.) Each and every ground in said PETITION FOR REHEARING is now referred to and incorporated herein,

with the same force and effect as if herein set out in full. Said PETITION FOR REHEARING was opposed by the Board. (R. 299-300.)

On February 15, 1951, Alabama Marble Company, the petitioner herein, and respondent below, filed a MOTION FOR HEARING *EN BANC* on the ground that the *per curiam* judgment entered in said cause No. 13111 on January 22, 1951, is directly contrary to and overrules the decision of the same Court, namely, United States Court of Appeals for the Fifth Circuit, in *N. L. R. B. v. Dorsey Trailers, Inc.*, 179 F. 2d. 589. (R. 298-299.) On February 17, 1951, petitioner herein and respondent below, filed a brief in support of its said MOTION FOR HEARING *EN BANC*. The Board opposed the said MOTION FOR HEARING *EN BANC*. (R. 300-301.) On March 9, 1951, petitioner herein then filed a reply brief to Board's statement in opposition to petitioners said MOTION FOR HEARING *EN BANC*.

On May 4, 1951, the Court below entered the following order:

> "It is ordered by the Court that the Petition for Rehearing in this cause, be, and the same is hereby denied." (R. 301.)

On May 25, 1951, the Court below entered its decree enforcing the Board's order of June 6, 1949, against the petitioner herein. (R. 301-304.) Also, on May 25, 1951, the petitioner herein presented to the Court below its motion for an order staying the execution of the

Court's decree entered on May 25, 1951, in order that petitioner might apply to this Court for a writ of certiorari. On May 25, 1951, the Court below entered its order staying the execution of its said decree entered on May 25, 1951, for a period of thirty (30) days pending an application to the Supreme Court for a write of certiorari. (R. 305.)

2.

BASIS FOR THIS COURT'S JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1) (28 U. S. C. A., Section 1254 (1).) and Section 10 (e) of the NATIONAL LABOR RELATIONS ACT, as amended (29 U. S. C. Section 160 (e), 29 U. S. C. A., Pocket Part Section 160 (e).).

3.

QUESTIONS PRESENTED.

1. Whether the work stoppage on Monday, October 6, 1947, constituted federally protected concerted activities within the meaning of Section 7 of the Act.

2. Whether the work stoppage on Monday, October 6, 1947, which was in violation of the no strike provision contained in the existing collective bargaining agreement and which occurred within the sixty day period provided in Section 8 (d) of the Act after the employer and Union had exchanged the

notices required by Section 8 (d) of the Act, constituted a violation of Section 8 (b) (3) of the Act.

3. Whether there is a conflict between Section 2 (3) and Section 8 (d) of the Act as to the status of an employee.

4. Under Section 8 (d) of the Act what constitutes reemployment of a striking employee.

5. On Monday, October 6, 1947, there was a complete work stoppage in petitioner's production operation. The existing collective bargaining agreement precluded a lock-out. Petitioner and Union had exchanged the notices required by Section 8 (d) of the Act. Was petitioner under a duty because of Section 8 (d) not to discharge all of its employees.

6. Because of the work stoppage on Monday, October 6, 1947, could petitioner have then and there discharged or suspended all of its employees without violating the Act.

7. Did Union's failure or refusal to arbitrate the discharge of Adair, Wilson, Adams and Kinser, as provided in the grievance procedure contained in the existing collective bargaining agreement, constitute a violation of Section 8 (d) or 8 (b) (3) of the Act.

8. Whether as a matter of law or from the evidence on the record considered as a whole there is any basis for finding, concluding, holding or decreeing that

petitioner violated Section 8 (a) (3) of the Act by discharging Adair, Wilson, Adams and Kinser in view of the following, which constitutes all that is contained in the record regarding petitioner's "anti-union animus" or improper motivation:

(a) "The respondent (petitioner here) as of October 6 (1947) had not committed any unfair labor practice." (INTERMEDIATE REPORT, R. 149.)

(b) "While the Union leaders were discharged, the circumstances under which they were released do not indicate that respondent was motivated by a desire to weaken the Union's position at the bargaining table, *to destroy its majority*, or to avoid the respondent's obligation to bargain." (Emphasis added.) (INTERMEDIATE REPORT, R. 173.)

(c) Union representative Walter L. Michell stated that Adair, Wilson, Adams and Kinser "were discharged because they did not agree with Mr. Smith and with the company on its proposal to reinstate part of the nine handpolishers and leave one out." (ABR. 95.)

(d) Petitioner treated and considered Adair, Wilson, Adams and Kinser in the same category as Ellison, the discharged handpolisher not permitted to return to work, and believed that their misconduct warranted petitioner in discharging them. (ABR. 158.)

(e) Other Union officers, namely, Joe Kirk and Douglas Robinson, were not discharged by the petitioner. (ABR. 78.)

9. Did the no strike provision in the existing collective bargaining agreement constitute a waiver of the right to strike violative of Section 13 of the Act.

10. Were the strikers reemployed within the meaning of Section 8 (d) the Act when petitioner's representative at the evening meeting with representatives of the Union on Monday, October 6, 1947, the day of the complete work stoppage, said that all could return to work the next day, except the nine discharged handpolishers.

11. Was there any legal consideration for the strikers returning to work on Tuesday, October 7, 1947.

12. Did petitioner have a legal right to expect its employees to return to work because of Section 8 (d) of the Act.

13. Should petitioner's MOTION TO DISMISS the complaint in Case No. 10-CA-185 based on charges filed by the Union, made at the close of the hearing, (R. 139) have been sustained because no evidence was offered to show that Union had complied with Sections 9 (f), (g) and (h) of the Act.

14. (a) Under the circumstances, did the mere statement by petitioner's Assistant General Manager, during the evening meeting with Union representatives on the day of the complete work stoppage, Monday, October 6, 1947, that all could return, except the nine discharged handpolishers, constitute a condonation of the activities of all strikers, including the

four individual complainants, Adair, Wilson, Adams and Kinser.

(b) Under the circumstances did such statement constitute a waiver and preclude petitioner from taking disciplinary action at a later date after there had been an investigation and petitioner had satisfied itself as to the guilt of Adair, Wilson, Adams and Kinser.

(c) At the time petitioner made such statement was it under a legal duty to reserve to itself the privilege of disciplining any participant in the work stoppage in order to later discipline without incurring the sanctions of the Act.

15. Did petitioner waive or condone the unlawful and improper conduct of Adair, Wilson, Adams, Kinser by permitting them to return to work on Tuesday, October 7, 1947, the next day after the complete work stoppage on Monday, October 6, 1947.

16. Under all the circumstances did petitioner take timely action, that is, did petitioner take disciplinary action against Adair, Wilson, Adams and Kinser within a reasonable time after it had knowledge of their respective acts of misconduct.

17. Does the Act change or nullify the common law principle that when an employer continues to accept the services of an employee after knowledge that such employee has breached his contract of employ-

ment, *there is a prima facie condonation of the offense only in the absence of any explanation.*

18. Does the Act change or nullify the common law principle that an employer, after ascertaining that an employee has breached his contract of employment, has a reasonable time in which to investigate and fully satisfy himself as to the guilt of such employee before taking any disciplinary action—in other words, waiting a reasonable time before acting will not amount to a waiver of the employers right to discipline or a condonation of the offense committed by the employee.

19. Does the Act change or nullify the common law principle that even when an employer continues to accept the services of an employee after knowledge that such employee has breached his contract of employment, such does not, as a matter of law, establish a waiver of the employer's right to discipline such employee.

20. Does the Act change or nullify the common law principle that an employer who continues to accept the services of an employee after knowledge that such employee has breached his contract of employment is presumed to have waived such breach *only in the absence of reasonable cause for delay in discharging such employee.*

21. Did petitioner intend to relinquish its right to discipline those responsible for the complete work stoppage.

22. Whether, as a matter of law, petitioner discharged each of the four individual complainants, namely, Adair, Wilson, Adams and Kinser, for legal cause within the meaning of Section 10 (c) of the Act.

23. Whether, as a matter of law, it was proper to find, conclude, hold or decree that the knowledge of certain of petitioner's foremen was, as a matter of law attributable to the petitioner.

24. Whether the finding, conclusion, holding or decree that petitioner was required to reserve to itself the privilege of disciplining any participant in the work stoppage before permitting its employees to return to work the day following the complete work stoppage on Monday, October 6, 1947, in order to later discipline any participant in the said work stoppage is an improper interference by the Board with petitioner's discretion in the management of its business.

25. Whether, as a matter of law, an employer is required, before permitting any of his striking employees to return to work, to reserve to himself the right to discipline the participants therein, in order to later discipline any such employee.

26. Whether, as required by the declared policy of the Act, the decree of the Court below, protects commerce from interruption by encouraging the practice and procedure of collective bargaining.

27. Whether the decree of the Court below permits the Board to interfere with petitioner's right to manage its business in keeping with its own decision.

28. Whether the decree of the Court below is erroneously based on the assumption that the conduct of Adair, Wilson, Adams and Kinser constituted concerted activities protected by the Act.

29. Whether there is substantial evidence on the record considered as a whole to support the holding that the reinstatement of Adair, Wilson, Adams and Kinser with pay is necessary to effectuate the purposes of the Act.

30. Whether the decree of the Court below permits the Board to alter its earlier position expressed *In The Matter of NATIONAL ELECTRIC PRODUCTS CORP.*, decided December 1, 1948, 80 N. L. R. B. 995, and thereby bring about through its administration of the Act harsh, unjust, unreasonable inequities.

4.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The United States Court of Appeals for the Fifth Circuit, without writing an opinion, has decided novel, unsettled and important questions of federal law involving the construction of sections recently added to the *National Labor Relations Act* by the *Labor Management Relations Act, 1947*, which have not been, but should be settled by this Court. An early authoritative decision of these questions by this Court is of pressing importance, not only to the petitioner but also to employers, employees and labor organizations throughout the United States of Amer-

ica, and as well to the National Labor Relations Board.

To the extent that the decree of the Court below sustains the position of the Board with respect to the legal principles of condonation or waiver it is not in accord with the following authorities:

Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357.

Compania Constructora Bechtel-McCone, S. A. v. McDonald, 9 C. C. A., 1946, 157 F. 2d. 749.

N. L. R. B. v. Dorsey Trailers, Inc., 179 F. 2d. 589.

In re Nagel, 2 C. C. A., 1921, 278 F. 105.

Rosbach v. Sackett & W. Co., 1909, 134 App. Div. 130, 118 N. Y. Supp. 846.

Goold v. Singh, 88 Cal. App. 339, 263 P. 548.

Champion Sparkplug Co. v. Automobile Sundries Co., 2 C. C. A., 1921, 273 F. 74.

Troy Fertilizer Co. v. Logan, 90 Ala. 325, 8 So. 46.

Gordon v. Dickinson, 100 W. Va. 490, 130 S. E. 65, 44 A. L. R. 526.

Fitzpatrick Square Bale Ginning Co. v. McLaney, 153 Ala. 586, 44 So. 1023.

Jonas v. Field, 83 Ala. 445, 3 So. 893.

In the Matter of National Electric Products Corp., decided December 1, 1948, 80 N. L. R. B. 995.

39 C. J., Sec. 89 (3), p. 88.

56 C. J. S., Sec. 43, p. 433, et seq.

35 Am. Jur., Sec. 50, p. 481, et seq.

18 R. C. L., Sec. 27, p. 517.

Dawson Farmers Elevator Co. v. Opp., 57 N. D. 598, 223 N. W. 350.

Prior to the decree of the Court below the Board had ruled upon the same factual issues and gave an opinion which would have resulted in a decision favorable to the petitioner had such earlier decision been followed or applied by the Board in the first instance. *In The Matter of National Electric Products Corp.*, decided December 1, 1948, 80 N. L. R. B., 995. The decree of the Court below confuses the administrative position of the Board and results in uncertainty for all interested parties and fails to establish any new rules of law for the guidance of employers, employees, or labor organizations. The decree of the Court below has brought chaos. It is now urgent that the Supreme Court settle such issues.

There is a conflict between the decree of the Court below and the position taken by the Board *In The Matter of National Electric Products Corp.*, decided December 1, 1948, 80 N. L. R. B., 995, as to what will best effectuate the purposes of the Act in such a case as is here before this Court, and the said decree of the Court below is not in accord with the designated policy of the Act as expressed in:

N. L. R. B. v. Norfolk Southern Bus Corp., C. C. A. 4, 1946, 159 F. 2d. 516, certiorari denied 67 S. Ct. 1085, 330 U. S. 844, 91 L. Ed. 1290.

N. L. R. B. v. Flotill Products, C. A. 9, 1950, 180 F. 2d. 441.

To the extent that the decree of the Court below permits the Board to declare authoritatively that an employer must make reservations or qualifications re-

serving his right to discipline employees before saying that such employees may return to work constitutes an improper interference by the Board with the right of an employer to conduct its business in keeping with its own discretion, and is in conflict with the following decisions:

N. L. R. B. v. Jones & Laughlin Steel Corp., 1937, 81 L. Ed. 893, 916, 301 U. S. 22, 45-46.

N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 8 L. Ed. 627, 123 A. L. R. 599.

N. L. R. B. v. Union Pacific Stages, 9 C. C. A., 1938, 99 F. 2d. 153.

Standard Life & Stone Co. v. N. L. R. B., 4 C. C. A., 1938, 97 F. 2d. 531.

N. L. R. B. v. Robbins Tire & Rubber Co., Inc., 5 C. C. A., 1947, 161 F. 2d. 302.

Wyman-Gordon Co. v. N. L. R. B., 8 C. C. A., 153 F. 2d. 480.

N. L. R. B. v. Montgomery Ward & Co., Inc., 8 C. C. A., 157 F. 2d. 486.

To the extent that the decree of the Court below holds that petitioner did not for good cause discharge Adair, Wilson, Adams and Kinser it is in conflict with the following:

Associated Press v. N. L. R. B., 301 U. S. 103, 132, 81 L. Ed. 953.

In re Underwood Machine Co., 74 N. L. R. B. No. 126.

N. L. R. B. v. Clarksburg Publishing Co., 4 C. C. A. 120 F. 2d. 976.

N. L. R. B. v. Robbins Tire & Rubber Co., Inc., 5 C. C. A. 1947, 161 F. 2d. 798.

N. L. R. B. v. Continental Pipeline Co., 5 C. C. A., 1947, 161 F. 2d. 302.

N. L. R. B. v. Fulton Bag & Cotton Mills, 5 C. A. 1949, 175 F. d. 675.

To the extent that the decree of the Court below holds that the conduct of Adair, Wilson, Adams and Kinser constituted federally protected concerted activities within the meaning of the Act, it is contrary to the provisions of Sections 7 of the Act as is shown by H. R., Rep. No. 510, 80th Cong., 1st Sess., p. 38 a part of which is quoted in footnote 15 in *International Union, U. A. W., A. F. L., Local 232 v. Wisconsin Employment Relations Board, et al.*, 69 S. Ct. 516, decided February 28, 1949.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the United States Court of Appeals for the Fifth Circuit, be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

JOHN J. SMITH,
Counsel for Petitioner.

APPENDIX.

Pertinent portions of NATIONAL LABOR RELATIONS ACT, as amended (29 U. S. C. A. Pocket Part, Sec. 151, *et seq.*).

Findings and Policies.

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of

competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designa-

tion of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (29 U. S. C. A., Pocket Part, Sec. 151.) (Emphasis supplied.)

Definitions.

Sec. 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . (29 U. S. C. A., Pocket Part, Sec. 152 (3).)

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3). (29 U. S. C. A., Pocket Part, Sec. 157.)

Unfair Labor Practices.

Sec. 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; (29 U. S. C. A., Pocket Part, Sec. 157 (a) (1).).

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

(b) It shall be an unfair labor practice for a labor organization or its agent—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable terms and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract does not compel either party to agree to a proposal or require the making of a concession: Provided,

That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. *Any employee who engaged in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.* (29 U. S. C. A., Pocket Part, Sec. 158.) (Emphasis supplied.)

Prevention of Unfair Labor Practices.

Sec. 10—

(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .

(e) . . . *The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).* (29 U. S. C. A., Pocket Part, Sec. 160.) (Emphasis supplied.)

Limitations.

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. (28 U. S. C. A., Pocket Part, Sec. 163.)

No. 140

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FILED
JUN 29 1951
CHARLES ELMORE CROPL
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APPENDIX TO PETITIONER'S BRIEF

In the United States Court of Appeals
For the Fifth Circuit

No. 13111

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ALABAMA MARBLE COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

U. S. COURT OF APPEALS
FILED
APR 6 1950
Sally P. Dodd
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General Counsel's Exhibits:

Exhibit 2—Separation Notice of Charles T. Adair. Received in evidence at page 6. Photostatic copy bound in opposite 32

Excerpts from Exhibit 6—Agreement, made November 7, 1946, between Alabama Marble Company and International Association of Marble, Slate & Stone Polishers, Rubbers & Sawyers, Tile & Marble Setters Helpers, and Terrazzo Workers Helpers, A. F. of L. Received in evidence at page 14. Printed at 33

Respondent's Exhibits:

Exhibit 18—Statement of C. W. O'Neal, dated October 13, 1947. Received in evidence at page 21. Printed at 34

Exhibit 19—Statement of A. J. Carden, dated October 13, 1947. Received in evidence at page 21. Printed at 35

Exhibit 20—Statement of E. I. Dison, dated October 13, 1947. Received in evidence at page 21. Printed at 35

Exhibit 21—Statement of W. C. Kinser, dated October 13, 1947. Received in evidence at page 22. Printed at 36

Exhibit 22—Statement of J. W. Green, dated October 13, 1947. Received in evidence at page 22. Printed at 36

[1] Before the National Labor Relations Board
Tenth Region

In the Matter of ALABAMA MARBLE COMPANY and CHARLES T. ADAIR, An Individual	Case No. 10-CA-86
ALABAMA MARBLE COMPANY and W. A. WILSON, An Individual	Case No. 10-CA-87
ALABAMA MARBLE COMPANY and W. A. ADAMS, An Individual	Case No. 10-CA-88
ALABAMA MARBLE COMPANY and C. M. KINSER, An Individual	Case No. 10-CA-93
ALABAMA MARBLE COMPANY and LOCAL NUMBER 133, INTERNATIONAL ASSOCIATION OF MARBLE, SLATE AND STONE POLISHERS, RUBBERS AND SAWYERS, TILE AND MARBLE SETTERS HELPERS AND TERRAZZO WORKERS HELPERS, A.F.L.	Case No. 10-CA-185

[2]

Courtroom,
County Courthouse,
Talladega, Alabama,
Tuesday, June 8, 1948.

Pursuant to notice, the above-entitled matter came on for hearing at 10: a. m.

Before: SIDNEY L. FEILER, Trial Examiner.

APPEARANCES:

WILLIAM M. PATE, ESQ., 701 Atlanta National Building, Atlanta 3, Georgia, appearing on behalf of General Counsel.

JOHN J. SMITH, ESQ.,	702 First National Building, Birmingham, Alabama.
C. W. STRINGER, ESQ.,	Talladega, Alabama, appearing on behalf of Alabama Marble Company, the Respondent.
WALTER L. MITCHELL,	Organizer, A. F. of L., Representative, A. F. of L. and International Union, 417½ North 21st Street, Birmingham, Alabama.
B. C. MITCHELL,	International Representative of International Union, Post Office Box 203, Childersburg, Alabama, appearing on behalf of Local Number 133, International Association ot Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Workers Helpers, A. F. of L., the Charging Party.

* * *

[149] CHARLES T. ADAIR, [150] a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner FEILER: Be seated.

Direct Examination.

* * *

[151] Q. What was the last job that you had with the Alabama Marble Company? A. Checker and inspector.

* * *

[152] (By Mr. PATE) Who was your immediate supervisor? A. Mr. George Warren.

Q. And what part of the plant or Company's operations was he over? A. Finishing.

Q. Finishing department? A. Yes, sir.

* * *

[153] Q. At any time while you were working with the Company did a labor organization make an effort, to your knowledge, to organize employees? A. I don't believe I follow you; just that point.

Trial Examiner FEILER: Read the question back for the witness.

(Last question read.)

A. Well, American Federation of Labor did.

Q. (By Mr. PATE) When did that happen? A. I don't remember—I don't remember the exact date, but it was in '46.

Q. Did you join that organization yourself? A. Yes, sir.

Q. About when did you join? A. It was the early part of September, in '46.

Q. At any time after that was there a local union formed of the employees at the plant? A. Yes, sir. Local 133.

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[154] Q. Did you ever have any office in it? A. Secretary, for—and Treasurer, but I was Treasurer a good while before I was made Secretary.

Q. When did you first become Treasurer? A. When it was established.

Q. Were you the first Treasurer? A. Yes, sir.

Q. How long did you continue to hold that position? A. Until the first of January, 1948.

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[155] (By Mr. PATE) Did you become Secretary or Treasurer first, Mr. Adair? A. Treasurer. When the organization was established.

Q. That was in 1946. A. Yes, sir.

Q. And I believe you stated that you became Secretary some time in 1947? A. Yes, sir.

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[157] Q. Did you report to the plant for work on October 6, 1947? A. Yes, sir.

Q. What time did you go to the plant? A. Well, it was—oh, about 7:15.

Q. Was that in the morning? A. Yes, sir.

Q. Was that the time you usually went? A. Yes, sir.

Q. Will you tell us just what you saw happen there after you reached the plant? A. Well, my foreman, Mr. Warren, called me and hands me a letter and tells me to read it. Upon reading the letter I discover that six—nine; pardon me; nine men of the hand-polishing department have been discharged.

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[158] Q. Did you have any conversation with Mr. Warren then? A. Yes, sir.

Q. Where were you and Mr. Warren at that time? A. At the checker's desk.

Q. Was anyone else present there? A. No, sir.

Q. Will you tell what he said and what you said?

* * *

[158] A. I asked him, Did he know what trouble this might cause, and he says, "I think I do."

I told him, I says, "Kind of an unusual thing at the Ala-[159] bama Marble Company for nine men to be suddenly discharged without a notice of being discharged."

He says, "Well," he says, "there's nothing I can do about it," and he tells me to tell the men as they come in not to punch the clock but to come to his office, and the ones that I did see, well, I told them, but I didn't see them all.

Q. (By Mr. PATE) Was that the end of your conversation with Mr. Warren? A. Yes, sir. He immediately went to his office.

Q. Did you see some of the men? A. Yes, sir.

Q. Did you give them the instructions that Mr. Warren told you to? A. Yes, sir.

Q. Will you tell, then, just what else transpired that morning that you saw? A. Well, the word got around pretty rapidly. There was a great confusion and the men begin to gather. Seemed to be a great interest all of a sudden and it was automatically agreed to—that there wouldn't anybody work until it was settled, or something done about it.

Q. Where was that agreement made? A. Just in the finishing plant, there.

Q. Who was present in the finishing plant? A. Well, there was Douglas Robinson, my brother, Houser, [160] Ellison—that's A. F. Ellison—and a great deal of the finishing plant was present at that time.

Q. Was any kind of meeting of a Union committee held that morning? A. Not right then, but I did go—made it my point to go and see if I could get the committee. I went for Mr. Kirk.

Q. Was Mr. Kirk a member of the committee? A. Yes, sir.

Q. Was that Joe Kirk? A. Joe Kirk. And—

Q. Did you get any of the others? A. I went for Mr. Wilson.

Q. Is that Mr. W. A. Wilson? A. Yes; W. A. Wilson.

But I didn't see either one of the men at that time, but I left word at their place what had happened, and for them to come over in the finishing plant, and they did come over later.

Q. Did any of the other committeemen come? A. Well, Robinson was a committeeman. He was already there. H. D. Robinson. So the committee gathers with a majority of the finishing plant. W. P. Harrison, Jr. comes along and calls me and says, "We want to get this straightened out."

I says, "Well, I do, too," and—

Q. And who is W. P. Harrison, Jr.? A. Well, now, I understand he is foreman of the shop, but at [161] that time I don't know exactly the position of his job. But he was looking after the marble that was going out being shipped.

Q. Is his father with the Company, too? A. Yes, sir.

Q. Do you know his father's position? A. I don't know exactly what his position is, but he is one of the stockholders. I can't give you exactly—

Q. All right. Go ahead and tell us exactly what happened from that point? A. I suggested to he, Mr. Harrison, that he go and get Mr. King; bring him down and see if we couldn't come to some agreement before any trouble would arise. He said he would, and he left immediately, but he didn't return. So everyone just agreed to quit.

* * *

[176] Mr. PATE: I will ask that the Reporter mark as General Counsel's Exhibit 2 for identification this paper that purports to be the separation notice of Charles T. Adair.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

[177] (By Mr. PATE) I hand you General Counsel's Exhibit 2 for identification and ask you if you recognize that paper? A. Yes.

Q. What is that? A. That's the discharge paper that I received Thursday morning, following the Wednesday night meeting.

Q. Is that the one that Mr. Warren gave you? A. Yes, sir.

Mr. PATE: I will offer General Counsel's Exhibit 2 in evidence.

Trial Examiner FEILER: Is there any objection?

Mr. SMITH: No objection.

Trial Examiner FEILER: There being no objection, General Counsel's Exhibit 2 for identification is received in evidence.

(The document heretofore marked General Counsel's Exhibit 2 for identification was received in evidence.)

* * *

[242] Mr. SMITH: Mr. Examiner, counsel for the Government and counsel for the Respondent have had a conference and agreed to stipulate as follows: That on Monday, October 6, 1947, there was a complete work stoppage in the production operations of Alabama Marble Company, the Respondent in this hearing. There is no stipulation as to the legal effect of the facts so stipulated. The legal effect of the facts will be left with the Trial Examiner for his consideration and ruling.

Mr. PATE: We will so stipulate.

* * *

[352] C. M. KINSER a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[353] Q. What was your last job with the Company? A. Derrick operator.

Q. How long were you on that particular job? A. Well, continuously.

Q. You mean during this last period that you worked for the Company? A. Uh-huh.

Q. During that time did you ever join the Union? A. Yes.

Q. When did you join? A. Well, I went in as a charter member. I was one of the first to get in there.

Q. That was back in 1946? A. Yeh. September, the best I remember, of 1946.

[354] Q. Did you ever have an office of any kind in the Local? A. Yes. I was elected president of the Union the first meeting that was held.

Q. Was that back about September of 1946, also? A. Yes, it was the latter part of August, or first part of September, one.

Q. How long did you continue to hold that office? A. Up until some time in December, 1948—'47.

Q. '47. A. Yes, sir. Just before Christmas.

Q. During the time that you worked there was there any kind of work stoppage or a strike, that you remember? A. Yes. There was, I would call it a—just a work stoppage, because—

Q. When did that occur? A. That was in September 6th, I think.

Q. September the 6th, did you say? A. Wait a minute. Let's see. October. October the 6th.

Q. What year? A. The past year; '47.

Q. Did you go to the plant to go to work on that day? A. I did go to work that day.

Q. What time did you go to the plant? A. The usual time. 7:30.

Q. And how long did you work? [355] I guess I worked about 30 minutes.

Q. Well, at that time what happened that caused to stop work? A. Well, I think it was the Hosey boy that came up and told me—well, I noticed the air was getting weak and he come up there and told me they had trouble in the finishing department.

You see, I was in the quarry, a half a mile or so from the finishing department, and he told me that they had had some trouble down there of some kind and to come down there immediately and so I go and notify the supervisor on the job and start there and left the quarry continue working until we get it straightened out, and continue work, so when I got down there, I guess the entire shop was in a huddle. • • •

• • •

[356] A. Well, I asked them what the trouble was and they just told me that nine men had been discharged, so I don't remember just who I was addressing directly. They were just all around there. And they told me—I asked them why, and they said because they stayed at home the afternoon before to listen to a ball game and—

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[357] A. I asked them, I said, "This is the first I have known of any trouble brewing," and I said they should go back to work and handle it as a grievance, or have a special meeting and conduct it like you did on May—June the 6th, when we were refused a raise. • • •

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Trial Examiner FEILER: You got to the point in your testimony where you said, and I am summarizing it, that

the men should go back to work and handle the matter, I think you said as a grievance, or a special meeting; is that what you said?

* * *

[358] A. —and so they told me No. To go back to the quarry.

Trial Examiner FEILER: Go ahead.

A. And asked me if the quarry was still running and I said Yes, and since there was a majority present, and all was of the same opinion that I should return to the quarry and shut it down, which I did.

* * *

[359] Trial Examiner FEILER: * * *

You are up to the point in your testimony where you said, in substance, that you and the men in the quarry returned to the finishing department. You remember that part of your testimony. Now will you continue from there, as best you can, and tell us just what happened and what was said, there, in the order, and again without explanatory material. That's for counsel, later. What happened, or what was happening when you got back to the finishing department, and what did you do?

A. Well, there was different groups. They weren't all in one [360] single group. There were several groups scattered around and I got most of them I could together and told them that we would do what we could to get it—to get everybody back to work as soon as we could, and that there was some of them that lived out a way from their job that wanted to know what they should do; whether to hang around the rest of the day or go home; so as president of the Union I told all those that lived out of town to go home but be sure to return to work the next morning.

* * *

[372] Cross Examination.

* * *

[387] Q. All right. Now what other conversation took place between you and the three committeemen, A. F. Ellison, Douglas Robinson, and "And" Wilson on this occasion when you first entered the finishing plant from the southwest door thereof? A. Well, I suggested they return to their jobs and—

* * *

[388] Q. Well now, let me ask you this: Did you and the committeemen and the stewards constitute the officials of the Union? A. Yes.

Q. What decision did you and the committeemen and the stewards reach? A. Well, we reached the decision of the majority.

Q. What was your decision? A. Mine? I am not even allowed to vote, nor even make a decision.

Q. All right. What was the collective decision of the committeemen and yourself and the other officers of the Union on this occasion; namely, October 6, 1947? A. For me to go back to the quarry and shut her down. Of course, it was already shut down because there was no air.

Q. All right. Now then, the committeemen and the officers of the Union and the stewards agreed that you were to go shut [389] down the plant? A. Yes.

Q. To shut down the quarry; excuse me. A. The quarry.

Q. And you men, as officers and committeemen and stewards of this Union, reached this decision independently and on your own, didn't you? A. No.

Q. How did you reach it? A. Through the voice of the majority.

Q. Did you have a Union meeting there? A. I guess you would call it. It wasn't a special meeting. It was not a regular meeting. It was not posted like we usually did on the bulletin board. They was all there, so I guess you could call it a meeting.

Q. You had a Union meeting there, didn't you? A. There was no one there except Union members.

Q. What occurred in the way of reaching a decision that you were to go back and shut down the quarry? A. Well, just by a raising of hands.

Q. Who put the question to the men? A. I did.

Q. What did you say to them? A. I just asked them if they all felt the same way about it.

• • •

[392] Q. What question did you put to them? Just state it as you stated it to them. A. All right. They wanted me to go back to the quarry and close it down.

Q. You asked the men if they wanted you to go back to the quarry and close it down? A. Yes.

Q. Had anybody asked you to put that question to the men? A. No.

Q. You put it on, as president of the Union, didn't you? A. Yes.

Q. After you had talked with the committeemen? A. Yes.

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[403] Q. Now what did you do after that vote? A. I went back to the quarry.

Q. What did you do when you got up to the quarry? A. I crooked my finger at them; motioned for them to come out.

* * *

[406] Q. Then what happened? What happened? A. They came out.

Q. How many came out? A. All of them.

Q. In the whole quarry? A. In that section.

Q. Did the men in the other section, in all other sections of the quarry, come out? A. Not then. They didn't know it, at that time.

Q. Did you tell anyone to call the other men out? A. Yes.

Q. Who did you tell to call the other men out? A. W. A. Adams.

Q. W. A. Adams. A. W. A. Adams.

[407] Q. What did you tell W. A. Adams regarding the calling out of other men in other parts of the quarry on this occasion? A. He was standing just about where my engine room is, just about halfway between the quarry office and the blacksmith shop, because his air, I guess, had been cut off also, and he was down there and I motioned for him and told him to go to the stiff-leg section—we called it the stiff-leg.

Q. Is that the stiff-leg derrick you referred to? A. Yes.

Q. Was that derrick at that time located about the south end of the same quarry about which you called men out of the north end? A. Yes.

Trial Examiner FEILER: Proceed.

A. I told him to go and call the men out of there, because it was the rule of the majority that we stop everything until we can get some action.

* * *

[459] W. ALDRICH WILSON a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[460] Q. What was your last job with the Company? A. Millwright.

Q. How long had you had that particular job? A. Since '42. I believe.

Q. Did you join the Union when it came into the plant? A. Yes, sir.

Q. About when did you join? A. In October of '46.

Q. Did you at any time hold any kind of office in the Union? A. I was a committeeman.

Q. When did you become a committeeman? A. Let's see. It was—I believe it was March, in '47. I am [461] not sure. It was in '47. I think it was in March.

Q. How long did you continue to be a committeeman? A. Until sometime in December.

Q. Do you remember a work stoppage that occurred about October 6, 1947? A. Yes, sir.

Q. Do you remember that occasion? A. Yes, sir.

Q. Did you come to the plant to go to work on that day? A. Yes, sir.

Q. Did you actually go to work? A. No, sir.

Q. What time did you come to the plant? A. I come down, it was about 7:15.

Q. Will you tell us just what happened after you reached the plant; just what you saw? A. Well, the first I knew about anything was—it was just before 7:30 that morning. Charlie Adair came from the finishing plant over to the sawmill where I worked and told me to come over to the shop. He said they was having some trouble over there. There had been nine men fired. So I went on over.

Q. You went to the shop? A. Yes, I went to the shop.

Q. And just what happened after you reached the shop? [462] A. Well, by that time it was about 7:30. It was about work time. Right about the time I got over there, and there wasn't anything starting up, and somebody come by, I think it was Aubrey Ellison. "Let's go down to Warren's office." Warren was foreman of the finishing plant; he was, then. So I go on down there with him. And they was a bunch in there. I don't know just how many, nor who it was. They was eight or ten, I guess, and Aubrey, he walked in, too, where Mr. Warren was sitting in a chair and he was talking to him. I wasn't right close to him. I don't know just what he was saying to him. One thing I did hear Mr. Warren say to Mr. Aubrey Ellison and he told him that not to blame him with it. He said he had nothing to do with it. Aubrey was one of the fired men and most of the rest were standing right around in there with him.

Q. About what time of day was it when you were there? A. That was 7:30, or maybe four or five minutes after.

Q. How long did you stay there? A. I didn't stay there but just a--just maybe five minutes.

Q. Where did you go when you left? A. We come on

back down through the shop. There was a bunch of us walking along. And on down, and I come on down to the lower door, to the southwest door, and I come on back over to the sawmill; back over there where I worked.

Q. You went on to the sawmill? [463] A. I come on back to the place where I worked, after that.

Q. And what happened, if anything, after you reached the sawmill? A. When I got into the lower end of the mill, up there, I could see the fellows up there ganged up. Five or six—five, I believe it was, that works in there—and I walked up there and I told them, I says, "Well, nobody's working over there; everything's down."

One guy spoke up and said, "Let's strike, too, then."

I said, "I'll shut them down and go over there with them," so they stopped the mill. They had started up, over there.

* * *

[535] WALTER ASROE ADAMS a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[537] Q. (By Mr. PATE) What was your last job with the Company? A. Well, they had me rated as blacksmith.

* * *

[542] Q. (By Mr. PATE) I believe, Mr. Adams, that you were saying something about meeting Bill Kinser; is that correct? A. Yes, sir.

Q. Where did you see him? A. He was on the railroad track, about 30 yards, I would say, up above the little old quarry office; south of it.

Q. Who is "he"? A. He is as sub-foreman under J. M. Kinser.

Q. Under J. M. Kinser? A. Yes, sir.

Q. Well, what happened after you saw Bill Kinser? A. These other fellows come on up the road, there, Douglas Robinson and Aubrey Ellison, Cecil Kinser; they walked up where we was all talking.

Q. And were you then with J. E. Hendricks, too? You mentioned him? A. Yes, sir; he was there.

Q. And just what conversation did you have there? A. There wasn't any more, after they come up and told me to call them out of the quarry. Some one of them three did. I [543] don't know which one it was.

Q. Some one of the three, you say? A. Yes, sir. That come up there.

Q. Who were the three? A. Aubrey Ellison and Cecil Kinser and Douglas Robinson.

Q. Then after they told you that, or one of them told you that, what did you do? A. I went out there and hollered. Told them what they said.

Q. Who did you holler to? A. Well, all I saw was the man that run the broachers. They were standing up, all standing up there talking in a bunch. They didn't have any air.

Q. What part of the plant was that that you went to? A. That was the south end of the quarry, up where that stiff-leg derrick is.

Q. What did you say to the men when you went there? A. I just hollered and said, "They said come out".

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[804] WALTER L. MITCHELL, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (By Mr. PATE) Mr. Mitchell, will you give us your full name and address, please? A. Walter L. Mitchell, 417½ North 21st Street, Birmingham 3, Alabama.

Q. What is your occupation? A. I am Organizer for the American Federation of Labor.

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Q. Did you ever do any work among the employees of Alabama [805] Marble Company? A. Yes, sir, I did.

Q. When did you first do that? A. In the Summer of 1946.

Q. What work did you do there? A. Organized people in the Sylacauga area and at that time contacted the employees of Alabama Marble Company, signed them up into our union and requested recognition, etc.

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[807] Q. (By Mr. PATE) Well, after Local 133 was formed, were there any negotiations to your knowledge with the Company concerning the contracts? A. Yes, sir, negotiations were entered into and a contract was concluded.

Q. Did you participate in the negotiations? A. I did.

Q. Did you sign the contract? A. I did.

Q. When was that contract executed? A. November 7, 1946.

Mr. PATE: I will ask that this document, purporting to be [808] a copy of the contract between Alabama Marble Company and the Internation Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Workers Helpers, A. F. of L., be marked as General Counsel's Exhibit No. 6 for identification.

* * *

[809] (The document heretofore marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

* * *

[818] Q. (By Mr. PATE) Mr. Mitchell, do you remember an occasion [819] when there was a work stoppage at the Alabama Marble Company in October of 1947? A. I do.

Q. Did you go to the plant on that date? A. I did.

Q. When did you go there? A. I went in the afternoon. I received a call in the morning from one of the employees, a member of our Union, who requested that I come as soon as possible, and I could not get there until the afternoon. I contacted the Federal Conciliator assigned to the bargaining conference case and told him of the circumstances as I understood them, that there was a work stoppage, that I was not familiar with the details, and asked that he come in, and he and I went to the plant together from Birmingham.

Q. What time of day did you go to the plant? A. It must have been around 3:30 or 4:00 in the afternoon.

* * *

[820] Q. (By Mr. PATE) There was a meeting held some time during that afternoon or evening? A. Yes, sir, there was.

Q. Where was that meeting held? A. The Company's Sales Room.

Q. Did you attend it? A. I did.

Q. Who else was present at that meeting? A. For the Union, W. A. Adams, W. A. Wilson, Joe Kirk, Aubrey Ellison, and Douglas Robinson, and myself.

Q. Was the conciliator present? A. The conciliator was present.

Q. Who was present for the Company? A. Mr. W. M. King, and other Company officials who went in and out of the meeting.

Q. Was Mr. King present during the entire meeting? A. He was.

Q. Can you tell us just what was said and done at that meeting, starting from the time the meeting opened until it ended? [821] A. When I went into the meeting I went in telling Mr. King that I was very sorry for the work stoppage, that I did not know the circumstances or details of it yet, and had not made an investigation, but that the Union would live up to its contract and the Union was not on strike. Mr. King said it was a Union strike, the Union leaders had closed him down. I told him that it was not a Union strike because procedure had not been followed, the strike, if it was a strike, had not been authorized by the Union, that the Union would live up to its contract and order them back to work, that I was very sorry if the leaders had closed them down. He told me that it was costing him a lot of money, and he felt like, or he thought the Union leaders had not been properly trained as to their obligations and responsibilities under the contract. I told him that it was—I was partly to blame and at fault because they had not been properly trained, if they had not been, but part of it was due to the fact we did not have a meeting hall. In any case, Mr. King said it cost him a lot of money.

Q. Was there any further conversation then at the meeting? A. We discussed, and I made the proposition to him, that everybody should return to work the next morning, including the nine hand polishers that were discharged, and that the discharge of the nine hand polishers should be handled as a grievance, and if they were found guilty as charged by the company he could fire them, and in the meantime he would have [822] the advantage of their services, because under the contract if a discharged employee returned to work it would require back pay. Mr. King did not agree with that, and told me everybody could return to work with the exception of the nine discharged employees, that he was ready to go to arbitration with their cases.

I told Mr. King that I did not think it was right to go direct to arbitration, that he personally, as I understood it, had not heard the cases; that I did not know what the facts were and did not believe he did, that I thought the cases should be handled in accordance with the terms of the contract and should be handled as grievances and he should hear those grievances before we went to arbitration. Mr. King agreed with me before we adjourned the meeting that he would hear the grievances, and a meeting was set for Saturday, October 11th, to hear those grievances.

Q. Was any agreement reached as to whether or not the nine men should work in the meantime? A. No. Mr. King refused to allow those men to work, said they would stay discharged, that he would hear the grievances and they would stay discharged until they were charged to the contract grievance procedure or otherwise.

Q. Is that the substance of the entire discussion at the meeting? A. That was the subject of the discussion at the meeting.

[823] Q. Was the grievance meeting you referred to held on the following Saturday? A. It was.

Q. Where was that meeting held? A. The Company's Sales Office.

Q. Who was present at that meeting? A. Present for the Union were W. A. Adams, W. A. Wilson, Joe Kirk, Aubrey Ellison, H. D. Robinson, B. C. Mitchell, David L. Sherer, another organizer, and myself, for the Union. For the Company, Mr. H. M. King, Assistant General Manager, and Mr. John J. Smith, Attorney. Other officials came in and out.

Q. Was the conciliator present at that meeting? A. The conciliator was not present at that meeting.

Q. Will you tell us just what transpired at that meeting from the time it opened until it ended? A. That meeting—it was opened by me with a general statement about what the meeting was about. Mr. Smith, as I remember it, asked that we submit our grievance in writing, and I told Mr. Smith that there had been an agreement on the previous Monday night between Mr. King and me that these grievances would be handled. After some discussion we agreed to proceed.

Q. Did you proceed? A. The Union called in witnesses and examined those witnesses, and allowed cross-examination by the Company through its [824] attorney Mr. John Smith. During the course of the day and the evening we heard testimony from eight discharged employees, and Charles Adair—Charles Adair was the first witness.

* * *

[825] Q. Was the meeting you referred to held on October 15th then the next meeting? A. That was the next meeting.

Q. Did you attend that meeting? A. I did.

Q. Where was it held? A. In the Company's Sales Room.

Q. Who were present at that meeting? A. Present at

that meeting were W. A. Wilson, W. A. Adams, Joe Kirk, H. D. Robinson, C. M. Kinset, B. C. Mitchell, and myself. Aubrey Ellison came in late at that meeting. His mother was ill at the hospital and he came in late in the meeting. That is for the Union. For the Company, H. M. King, Assistant General Manager, and John J. Smith, Attorney—

* * *

[831] Q. Did you yourself have anything further to say, or anyone else present? A. I answered Mr. King by saying that I was the spokesman for the Union, the Union was the collective bargaining agent, and, speaking for the Union and the nine individual hand polishers, that the decision was not satisfactory, that the men would not come to work the next day, that we felt that the thing should be handled in accordance with the terms of the grievance procedure, and that we should submit it to arbitration. * * *

[832] A. We were ready to name our arbitrator and we thought the Company should name theirs. Mr. King stated that the Company was not yet prepared to name its arbitrator, it would have to think it over, and he would let me know. A further meeting was agreed to for October 22nd, to resume the interrupted contract negotiations.

* * *

[903] Mr. SMITH: At the request of counsel for the Government, I wish to say that I am now reading in two documents that counsel for all parties have agreed to as being exchanged by and between Alabama Marble Company and the Union on the night of [904] October 22, 1947 regarding the names of their respective arbitrators, first the notice given by the Union, which appears on stationery bearing the name "American Federation of Labor", shows "Walter L. Mitchell, Organizer, 5235 6th Avenue, South, Birmingham 6, Alabama, October 22, 1947. The International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Workers Helpers, Local 133, hereby names Mr. Hugh W. Brown, 501 Lyric Building, Telephone, 7-3038, Birmingham 3, Alabama, as the arbitrator for the Union in all cases ready for arbitration in accordance with the above Union's contract with the Alabama Marble Company dated November 7, 1946. Walter L. Mitchell".

The Company's notice, given to Mr. Mitchell, was as follows: "October 22, 1947. To Whom it May Concern: Ala-

bama Marble Company hereby names Mr. Lewis Jeffers, Trustees Loan and Discount Company, 2010 Second Avenue North, Birmingham, Alabama, Telephone Number, 3-9231, as its arbitrator to consider the three cases ready for arbitration, as provided in Article 5 of the effective contract between this Company and International Association of Marble Workers", etc., "Alabama Marble Company, by John J. Smith, its Attorney".

* * *

[1180] Re-cross Examination.

* * *

[1182] Q. * * * I understood you to say on direct examination that you received a call during the day to come to Alabama Marble Company, is that correct? A. That is correct.

Q. Who called you? A. One of the Local Union officers.

Q. Who was that officer? A. Charlie Adair, as I remember it.

Q. What did Charlie say to you on that occasion? A. He told me there was a work stoppage, and wanted me to come down as soon as I could.

* * *

[1208] Q. On the night of October 22, 1947, did the parties exchange the names of their respective arbitrator for the handling of certain grievances? A. They did.

Q. What grievances were these arbitrators to handle? A. All cases ready for arbitration.

Q. What cases were then ready for arbitration? A. There were two cases ready for arbitration.

Q. What were they? A. The case of the hand polishers and the case of the watchmen's over-time.

* * *

[1209] Q. Was there any discussion of any other case to be handled by the arbitrators? A. We had discussion of another case, but not any specific discussion to arbitrate that case.

Q. You mean just discussed the merits? A. We had a discussion at the beginning of the meeting of the discharge of four officers and committeemen, in which I told Mr. King and Mr. Smith that the Company had fired those individuals because they refused to allow the nine hand [1210] polishers to go back to work the next day, refused to order them to go back to work, and the Company fired them in an effort to destroy the Union.

Q. Was anything said with reference to those cases with reference to arbitration? A. Not by the Union.

Q. At any time did the parties agree that they would arbitrate the case of the four individuals? A. Not that I recall.

* * *

[1535] JAMES W. GREEN, was thereupon called as a witness for the respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[1536] Q. (By Mr. SMITH) Tell us what you saw and what you heard on that Monday morning, please, sir. Speak out now. A. You mean about the shut down?

Q. Tell us about the shut down? A. I don't know what to say first.

Q. What happened on that Monday morning? A. We shut down the gangs.

Q. Shut down the gangs? A. Yes, sir.

Q. Do you mean the gang saws? A. Yes, sir.

[1537] Q. Did you shut down the gang saws? A. Yes, sir.

Q. Did anybody tell you to shut down the gang saws? A. Yes, sir.

Q. Who told you to shut them down? A. Mr. Aud Wilson.

Q. Mr. Aud Wilson? A. Yes, sir.

Q. Who was present when Mr. Aud Wilson told you that? A. I don't remember whether there was anybody present or not.

Q. What did Aud Wilson say to you, please, sir, on that occasion? A. He just told me to shut the gang down, that they had fired all the hand polishers and to leave them shut down until I heard from him.

* * *

[1564] W. C. KINSER was called as a witness on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[1568] Q. * * * Then what happened? When did you next see Cecil? A. Well, he came back—Mr. Adams was coming down the track from the blacksmith shop.

Q. Now, which Mr. Adams? A. W. A. Adams.

Q. W. A. Adams? A. That is right.

Q. Did he work in the blacksmith shop? A. Yes, sir.

Q. He was coming down from the blacksmith shop? A. From the blacksmith shop.

Q. All right, sir. A. And Cecil told him to go to the stiff leg and call the men out over there.

Q. Where were you standing at the time Cecil told Mr. Adams to go to the stiff leg and call the men out? A. We were by the engine room,—by the engine, and he ran. I was about a third of the way between the little office and [1569] the—between the little office, the clock office and the blacksmith shop.

Q. That was at the quarry? A. That was at the quarry.

Q. All right, sir. After Cecil told Mr. Adams to go down to the stiff leg and call the men out what happened? A. Well, he never did make any stop. He turned around.

Q. Who didn't make any stop? A. Mr. Adams.

Q. All right. Mr. Adams didn't make any stop? A. No.

Q. All right, what happened? A. He immediately turned around and went to the stiff leg and Cecil turned and went to the north end of the quarry and those men were not as deep on the north end as they are on the south end and they came out last.

• • •

[1570] Q. What else happened? A. It wasn't a few minutes then until the men came down from the stiff leg or the south end of the quarry.

Q. Men came out of the south end of the quarry? A. That is right.

Q. Did all the men in the quarry come out? [1571] A. Yes, sir.

Q. How many men came out? A. Well, there was, I will say, between twenty-five and thirty. I don't remember exactly how many men we had at that time; somewhere between twenty-five and thirty.

Q. All right. What happened then on that occasion. A. We stood around there, around the clock. I went on down to the clock. Some of them asked the question should they clock out and I told them "No" and Cecil told them, "Yes, go ahead and clock out".

Q. Your brother told them to clock out? A. That is right. And they clocked out. And he told them to go to the finishing shop, they would go to work.

• • •

[1575] Mr. SMITH: Respondent offers its Exhibits 18 and 19 for identification in evidence at this time.

Mr. PATE: I have no objection.

Trial Examiner FEILER: There being no objection Respondent's Exhibits 18 and 19 are received in evidence.

[1576] (Thereupon, the documents previously marked for identification Respondent's Exhibits Nos. 18 and 19 were received in evidence.)

• • •

[1602] ELLIS IRVIN DISON was called as a witness on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

• • •

[1603] Q. What was your job with Alabama Marble Company in 1947? A. I had charge of the rubbing beds at the time and supervision over the coping and stock that comes out of the mill, sawmill.

Q. Do you remember the one day strike that occurred last year? A. Yes, sir, I do.

• • •

[1604] Q. How long did the rubbing bed men and their helpers work on this occasion? A. I would judge about ten, fifteen minutes; fifteen minutes maybe.

Q. What happened then? A. Well, we was ordered to shut down.

Q. Who told you to shut down? A. Charlie Adair was the first that told me to shut down.

Q. What did he say to you, Mr. Dison? A. He just said they had had some trouble in the shop up there and they would have to shut the face down until they got it settled.

• • •

[1607] Mr. SMITH: Mr. Reporter, I hand you here a notarized instrument dated October 13, 1947, signed by E. I. Dison and ask that you please mark this as Respondent's Exhibit No. 20.

• • •

[1608] (Thereupon the document referred to, previously marked for identification Respondent's Exhibit No. 20, was received in evidence.)

• • •

[1617] Mr. Smith: Mr. Reporter, I ask that you please mark the statement dated October 13, 1947, signed by W. C. Kinser, as Respondent's Exhibit No. 21 for identification.

• • •

[1618] (Thereupon the document above referred to, previously marked for identification Respondent's Exhibit No. 21, was received in evidence.)

• • •

[1620] Mr. Smith: Mr. Reporter, I ask that you please mark as Respondent's Exhibit 22 for identification a statement dated October 13, 1947 signed by J. W. Green.

• • •

[1621] (Thereupon the document above referred to, previously marked for identification Respondent's Exhibit No. 22, was received in evidence.)

• • •

[1631] Houston W. Harris was called as a witness on behalf of respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

• • •

Q. Were you employed by Alabama Marble Company on the occasion that the hand polishers did not report back to work on Friday afternoon, October the 3rd? [1632] A. That is right.

Q. What work were you doing for Alabama Marble Company? What was your job for the Alabama Marble Company at that time? A. I was a hand polisher.

• • •

Q. Tell us what happened during the morning of October the 3rd? A. Was that on a Friday?

Q. Yes, that is on a Friday, the day that the hand polishers did not come back to work for the afternoon work shift. A. Well, I reported to work at 7:30 and I brought a radio in and I had the radio on. Some time in the morning, I would say about 10:30, Mr. Warren come to me and asked me whose radio it was?

• • •

Q. What did you say to him, if anything? A. I told him it was mine. He said Mr. King didn't approve [1633] of the radio being there. If I didn't get it out he would do like he did with Harry King's piccolo. He would throw it out the window.

• • •

Q. All right. What happened then? A. Aubrey Ellison asked me what was the matter? I told him Mr. Warren told me to turn the radio off. And he says, "Well, why didn't Mr. Warren come to me instead of to you"?

Q. That was Aubrey Ellison who said, "Why didn't Mr. Warren come to me instead of to you"? A. Yes, sir.

Q. All right, sir. What did you say to him? A. I said, "I don't know why he didn't".

Q. What happened after that? A. Well, he said, "We should be able to listen to the radio, that it wasn't interfering with our work".

Q. That was Aubrey doing the talking? A. Yes, sir.

Q. All right, sir. A. And I agreed with him and so did the other hand polish- [1634] ers. And then it was agreed among us that we would stay out that afternoon and listen to the ball game.

• • •

[1679] JOHN J. SMITH was called as a witness on behalf of respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

• • •

[1730] Q. Now I wish you would state, Mr. Smith, what was done in regard to the arbitration after this meeting that was held on October 15th. A. If you don't mind I would like to get my notes in my file on arbitration.

Q. Yes. A. I will state to you that I have seen a copy of a letter dated October 16, 1947 sent by Alabama Marble Company over the signature of H. M. King, Assistant General Manager, addressed to the International Association of Marble Workers, and so forth, attention Mr. Walter L. Mitchell, Organizer, Lyric Building, Birmingham, Alabama, which shows that it was sent registered mail, return receipt requested, and which letter in substance says that the company would not be in a position to name an arbitrator by Friday, October 17, 1947 and stating further that the company would correspond with the union as quickly as we have reached a decision in this matter.

Now, then, next, on the 20th day of October 1947, in Birmingham, Alabama I received a call from Mr. Walter Mitchell while I was at my office in the First National Building on First Avenue and Twentieth Street in Birmingham. Mr. Mitchell asked whether the company was ready to name its arbitrator or at that time and said that the union was ready. I told him that the information I had enabled

me to say that the company could [1731] name its arbitrator when the parties met on Wednesday, October 22, 1947 and Mr. Mitchell said to me that the arbitrators named by the union and by the company should handle the grievances of the nine hand polishers and the question of overtime payments to the watchmen and I agreed with him.

Then Mr. Mitchell said to me that the union would like to present on October the 22nd, 1947 the grievances of the four individuals who had been discharged on October 16, 1947. I told Mr. Mitchell that that would be agreeable with the company.

Mr. Mitchell then said to me that if it were necessary the same arbitrators named by the parties on that occasion could handle all of the grievances and he specified the grievances of the nine hand polishers, the grievance involving overtime payments to watchmen and the grievances of the four individuals who had been discharged on October the 16th if it were necessary to take their cases, that is, the cases of the four, to arbitration and I agreed that that would be the manner in which the arbitrators would act.

Q. Give the names of those four individuals that you refer to. A. The four individuals that I refer to were Cecil Kinser, W. A. Adams, W. A. Wilson and—let me check my files for the other one—and Charles T. Adair.

Q. Now, did the company name an arbitrator? A. Yes, sir, the company did name an arbitrator.

Q. Whom did the company name? [1732] A. Louis F. Jeffers.

Q. And did the union name an arbitrator? A. Yes, sir.

Q. Whom did the union name? A. Hugh W. Brown.

Q. What, if anything, was done after these arbitrators were named? A. Well, Mr. Stringer, these arbitrators were named by the parties at their meeting on October 22, 1947 and after that Walter—or while I was in the sales of Alabama Marble Company on October 30, 1947 I stated to Mr. Walter Mitchell that I had heard that Mr. Hugh W. Brown was sick, critically ill and in the Highlands Baptist Hospital in Birmingham, Alabama. Mr. Mitchell told me that my information was correct. I asked him if he knew when Mr. Brown would be out? He told me he did not because he was so critically ill.

I stated to Mr. Mitchell on that occasion of October 30, 1947 that I thought the union should name some other person to act as its arbitrator in place of Mr. Brown due to the illness of Mr. Brown. Mr. Mitchell said he was not ready to name anyone else at that time.

Then following that, on November the 3rd, 1947, I personally wrote a letter to Mr. Walter Mitchell, Organizer, 5235 Sixth Avenue South, Birmingham 6, Alabama, and I wrote as attorney for Alabama Marble Company and I referred to my conver- [1733] sation with him on October the 30th, 1947 and then told him that on that day, November 3rd, I had tried to reach him by telephone and couldn't do so and then I asked him to give me the name, address and telephone number of the individual to act as arbitrator for the unions and suggested that he do it not later than Wednesday, November 5, 1947.

Q. Did you have a reply to that letter? A. I had no reply to that letter.

I next saw Mr. Walter Mitchell in the sales office of Alabama Marble Company at Gantt's Quarry, Alabama, on November the 6th, 1947. On that occasion I asked him if he had the name of another person to act as arbitrator for the union to take Mr. Brown's place. He said he was not ready to name an arbitrator at that time to act instead of and in place of Mr. Brown.

Then on November the 10th, 1947 while in Birmingham, Alabama and from my office I called Mr. Walter L. Mitchell by telephone and asked him if he would please name someone else to act for the union to arbitrate the three matters that were then pending. Mr. Mitchell said to me that the contract had ended, the contract was no longer effective, that it was the union's position that it would not name an arbitrator and that these matters would not be arbitrated.

* * *

[1865] H. M. KING was called as a witness on behalf of respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[1873] Q. You have heard testimony, I believe, Mr. King, that there was a general work stoppage at Alabama Marble Company on Monday, October 6, 1947, have you not? A. I have.

Q. Tell us what you know about the events of that day, Monday, October 6, 1947. A. On Monday morning, October the 6th, Bill Harrison came to my home about a quarter of eight—

Trial Examiner FEILER: Excuse me. I just want to remind you of one thing there. There are several juniors and seniors inside the plant.

The WITNESS: Yes.

Trial Examiner FEILER: And make sure whether we understand that you refer to a junior member of the family or not. Would this be Bill Harrison, Sr. or Jr.?

[1874] The WITNESS: Junior.

Trial Examiner FEILER: Junior. All right, I am sorry. You say he came to your home?

The WITNESS: He came to my home about a quarter of eight and said none of the men were at work except those on the rubbing beds; that all of those not at work were crowded around the rubbing beds and it seemed to him that there might be trouble. I told him to go back and tell E. I. Dison, foreman of the rubbing beds, to shut the beds down.

• • •

[1878] Q. (By Mr. SMITH) Now, Mr. King, I believe you testified that you remained at Gantt's Quarry either in your office or at your residence during the day of October 6, 1947 when the [1879] general work stoppage occurred? A. I did.

Q. Tell us what happened on that day. A. About five o'clock in the afternoon Mr. Virgil Finch of the Conciliation and Mediation Service called at my home and asked me if I would come down to the main office and meet him?

Q. And meet him, did you say? A. Yes.

Q. All right. A. I went immediately to the main office and met Mr. Finch.

Q. What happened there between you and Mr. Finch?

• • •

[1880] The WITNESS: I said I would meet with Mr. Mitchell. Mr. Finch said that Mr. Mitchell was at that time down in the finishing plant talking to the men and that as soon as he got in contact with Mr. Mitchell he would let me know. Mr. Finch called me at my home about six o'clock and asked me if I would meet with Mr. Mitchell in fifteen or twenty minutes? I said, "No, I won't meet with Mr. Mitchell in fifteen or twenty minutes, I am about to eat my dinner, but I will meet with Mr. Mitchell at 7:30 in the sales office."

Q. (By Mr. SMITH) Did you meet with Mr. Mitchell that night at 7:30 in the sales office? A. I did meet with Mr. Mitchell and a committee in the sales office. Mr. Finch was there and also Cecil Kinser. On my way to the sales office I went by the Gardners' home and asked R. M. Gardner and

C. O. Gardner to go down with me to the sales office and they were there in the sales office with me at the time we met with Mr. Mitchell and the committeemen and Cecil Kinser.

Q. At that time was Mr. W. H. Runge, Sr., and Mr. W. H. Runge, Jr., available to meet? A. No. They were away.

Q. Were they out of town? A. They were out of town. They were at Hot Springs, Ar- [1881] kansas attending a meeting of the National Association of Marble Dealers.

Q. Now the Gardners, Mr. Charles Gardner and Mr. R. M. Gardner, accompanied you to the sales office when you met with Mr. Virgil Finch, Mr. Walter Mitchell and the union committeemen and Cecil Kinser, is that correct? A. That is correct.

Q. All right. What happened there, please, sir? A. Mr. Mitchell said he was extremely sorry about the way it happened, that if he had been there he believed he could have prevented it; that the American Federation of Labor believed in living up to its agreements; that a strike was unauthorized and was not authorized by the union.

I told Mr. Mitchell that I resented extremely the whole affair. I told him that the men had acted in cold disregard for the welfare and interest of the company, that their acts were those of gross insubordination; that they had defied the company and they had practically thumbed their nose at us and told us to go to hell; that they had violated the contract and that it was time that they should realize what they were doing.

Mr. Mitchell said that he felt that he was partly to blame; that he had been very busy during the year and had not been able on account of that to give as much attention as he would like to have in instructing the men in the per- [1882] formance of the contract and he said he felt that all of them should be lectured and reprimanded.

I told Mr. Mitchell—no. He asked me if I would allow the hand polishers to go back to work the next morning? I said, "No, they were fired and they will stay fired". Mr. Mitchell then asked me if the other men could go back to work the next morning and I said they could.

Mr. Mitchell then asked me to handle the cases of the nine hand polishers as grievances; that he had some information that he was sure I didn't know about and he would like to present to me such information. I said I would listen to what Mr. Mitchell had to say. He asked me if I would meet with him and the committee the next morning? And I said

no, I would not but I would meet with him on Saturday at about eleven o'clock. He said that was agreeable to him.

Then Mr. Mitchell then said that he would like to talk to the men and the two committeemen and Cecil Kinser left the sales office. Mr. Mitchell had also said that he would let me know shortly whether or not the men would go back to work the next morning and then they left the sales office.

Shortly thereafter Mr. Virgil Finch left. I reckon about half past eight Cecil Kinser came into the office and said the men would go back to work in the morning. I said, "All right".

• • •

[1888] Q. Now, Mr. King, I want to ask you what you did during the period of time following the strike on Monday, October 6th and your meeting with representatives of the union on October 15, 1947 in connection with the one day work stoppage that did occur on Monday, October 6th? A. During the latter part of the week of October the 6th I visited the quarry and talked with Bill Kinser and he told me that on the morning of October the 6th when he and Cecil Kinser and Walt Adams and Joe Hendricks and several others were standing by the engine room of the little steel derrick he heard Cecil Kinser tell Walter Adams to go to the stiff leg and call the men out of the quarry. He then saw Walter Adams go toward the stiff leg. He saw Cecil Kinser go to the north end of the quarry and shortly thereafter all the men came out of the quarry.

Q. Did you say anything further to Bill Kinser at that time? A. Yes. I said, "Bill, will you make a statement of what you just told me"? He said he would. I told him then to get a statement from someone in the south end of the quarry who had seen or heard Walter Adams call the men out of the quarry. I told him to get a statement from someone in the north end of the quarry who had seen Cecil Kinser call or wave the men out of the quarry.

[1889] Q. Did you first ask Bill Kinser whether or not he had seen either his brother Cecil Kinser or Walt Adams motion the men out or call them out of the quarry? A. Yes. I asked him if he had seen Walter Adams call any of the men out of the quarry.

Q. What did he say when you asked him that? A. He said he had not.

Q. Did you ask him whether he had seen his brother Cecil Kinser call the men out of the north end of the quarry? A. I did.

Q. What did he say? A. He said he had not seen him.

Q. And then after that you asked him to find out if anyone had seen either Walt Adams or Cecil Kinser call the men out of the quarry, is that correct? A. That is right.

Q. And after you asked Bill Kinser to get that information for you what did he say? A. He said he would.

Q. Did you do anything else during that period of time? A. Yes. In the latter part of the week I also went to see E. I. Dison, foreman of the rubbing beds and asked him what had happened or what had taken place on the morning of October the 6th? He told me that on the morning of October the 6th, shortly after the work whistle had blown, that Charles [1890] Adair came to him and told him he would have to shut the beds down, that there has been some trouble in the plant and they would have to stay down until it was settled. Irving Dison said that he told Charles Adair that he would have to get orders from someone with more authority than he had before he would shut the beds down. He said shortly after that Aubrey Ellison came to him and told him he would have to shut the beds down, that they had had trouble in the plant and he would have to shut the beds down until it was settled.

Dison told me at this time that a great number of the men in the finishing plant had massed around the rubbing beds and that he was fearful of trouble and he shut the beds down. I asked him—

Q. What else did you ask him? A. I asked him if he would sign a statement of what he told me? He said he would.

Q. Did you do anything else during that period of time, Mr. King? A. Yes, sir. During that time or about that time I went to the mill office and talked with W. E. Sorrell, foreman and told him I wanted to find out who had shut the gangs down. I told him to go to the mill and get Dune Green.

Q. Is Dune Green the gentleman that testified here as James W. Green? A. That is right.

[1891] Q. What did James W. Green or Dune Green do for Alabama Marble Company at the time that you are testifying about? A. Dune Green operated on the shift from 7 o'clock until 3, 3:40, 3:30 it generally is.

Trial Examiner FEILER: Counsel's question was what was his job at the plant?

Q. (By Mr. SMITH) What did he do, Mr. King? A. He operated the saws. He had charge of operating the saws.

Q. What sort of saws? A. The gang saws.

Q. Was there anybody else in charge of the gang saws during the shift that he worked? A. There is only one operator on that shift that leads for the gangs.

Q. And that operator was Dunc Green? A. And that operator was Dunc Green.

Q. I believe you said you asked Mr. Sorrell to have Dunc Green come in, is that right? A. That is right.

Q. What happened then? A. I asked Dunc if he had shut the gangs down? He said he had. I asked him who told him to shut them down? He said Aud Wilson had told him to shut the gangs down, that they had some trouble over in the shop and to keep them shut down [1892] until he told him to start them up.

Q. Did you do anything further—did you say anything further to Dunc Green on that occasion? A. I asked Dunc Green if he would sign a statement saying just what he had said? He said he would.

* * *

[1894] Q. (By Mr. Smith) Now, Mr. King, before I show you certain of the company's exhibits that are in evidence I would like to ask you if W. H. Runge, Sr. and Mr. W. P. Harrison, Sr., and R. M. Gardner and yourself are all of the stockholders of Alabama Marble Company? A. That is correct.

Q. Are you four men all of the directors of Alabama Marble Company? A. That is right.

Q. Now, Mr. King, I hand you Respondent's Exhibit 18, Respondent's Exhibit 19, Respondent's Exhibit 20, Respondent's Exhibit 21 and Respondent's Exhibit 22 and ask you to please look at those and, if you know, tell us what they are. A. They are statements made by men—

Q. Well, I will ask you who gave you those statements, if [1895] you know? A. Bill Runge handed me these statements.

Q. All right. And they are what kind of statements? What are they? A. They are written statements.

Q. Are those the ones that he returned to you after you had requested him to get certain information for you? A. Yes.

* * *

[1896] Q. After you received these statements what did you do? A. I held a meeting in the main office on October the 15th about five o'clock with W. H. Runge, Sr., W. P. Harrison, Sr. and R. M. Gardner.

Q. What happened at that meeting, Mr. King? A. We went over the matter of thirteen individuals. I showed the statements that I had received on the 13th and the 14th and I also told them of oral statements made by Dison, Bill Kinser, J. M. Green and also facts on the nine hand polishers and also reviewed the statements made by eight hand polishers and Charles Adair on October the 11th and after carefully considering the matter we decided that in the case of the individual hand polishers that Jake Teel, a hand polisher, we would return to work the next morning with pay and with seniority as we believed what he said when he said that he would have returned to work on the afternoon work period of October the 3rd if his wife had not been ill.

In the case of seven hand polishers, Jake Adair, Hendricks Adair, W. K. Hosey, B. C. Hosey, Charles Watkins, Bob Lovett and Eddie Houser, we would let them go back to work the next morning without pay but with full seniority.

In the case of Aubrey Ellison we decided we would fire him; that he would stay fired; that he by his own statement on October 11th said that he could have prevented the walkout if Warren had come to him and, also, that he and other [1897] men were responsible for the total work stoppage of operations on October the 6th.

We also decided in the cases of W. A. Adams, W. A. Wilson, Cecil Kinser and Charles T. Adair we would fire them the next morning for having caused the complete work stoppage on October the 6th; that they had fomented and incited the walkout; that they had ordered men off of their jobs and had ordered machinery shut down.

We further decided that when we went into the meeting at 7:30 that evening we would tell Mr. Mitchell and the committeemen of our position on Teel and the seven polishers as separate from that in the case of Aubrey Ellison. That when we told Mr. Mitchell of the case of Aubrey Ellison we would also tell him that we were going to fire Walter Adams, W. A. Wilson, Charles T. Adair and Cecil Kinser.

* * *

[1904] Q. Now, then, following this meeting on October the 15th, 1947 what did you do, if anything, in connection with W. A. Adams, W. A. Wilson, Charles T. Adair and Cecil Kinser? A. We fired them at work time on October the 16th. We gave them their envelope con-

taining their pay and also a separa- [1905] tion notice on which we stated why they were fired.

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[1948] Cross Examination.

• • •

[1964] Q. When did you first start trying to get the information about how this work stoppage was caused? A. The latter part of the week of October the 6th.

Q. And had you decided before that time to make an effort to investigate and get the information? A. I had not decided. I was very, very busy due to the strike, to the strike of the hand polishers and the strike of October the 6th and practically my whole time and thought was taken up in the detail work of getting it arranged and getting [1965] the plant back into production.

Q. Well, then, you did not know on October 6th, at the time you had the meeting, that you were going to discharge anybody because of their participation in the strike? A. That thought didn't occur to me at that time.

Q. Well, had that thought occurred to you at the time of the meeting of October 11th? A. Yes.

Q. And at that time had you definitely decided to try to ascertain who caused the strike and to discharge them? A. That is right.

Q. And did you at that time make that decision known to the committeemen or any other representative of the union? A. I did not.

• • •

[1967] Re-direct Examination.

• • •

[1981] Q. (By Trial Examiner FEILER) Do you recall your testimony about meeting with the other directors on October 15th to discuss your reports on the work stoppage on October 6th? Do you remember that? A. Yes, sir.

Q. And I think you testified that at the conclusion of the board of directors' meeting you stated that you thought it best to at the meeting that evening state the company's position on Ellison and not mention the other four. Do you remember your testimony on that? A. Yes, sir.

Q. Why was it agreed to postpone announcing the decision on those four until the next day? A. Because everybody was pretty well heated up over it and I thought the best thing would be to drop it.

• • •

Board Counsel's Exhibit 2

FORM BESN-1 (revised-1-44)
UC-BT-101 revised

SEPARATION NOTICE

#4

Date last worked 10-16-47 Name of worker CHARLES T. ADAIR Social Security Number 416-03-0829

NOTE: A Separation Notice is Required Within 24 Hours After a Worker is Separated Regardless of the Reason of Separation. The worker named above was separated from our employ for the reason indicated by check mark (✓) below:

1. ☐ NO WORK AVAILABLE

GIVE FULL EXPLANATION

2. ☐ Quit work voluntarily without good cause connected with his work.
3. ☐ Discharged for dishonesty connected with his work.
4. ☐ Discharged because of a criminal act in connection with his work.
5. ☐ Discharged for an act endangering the safety of others in connection with his work.
6. ☐ Discharged for actual or threatened deliberate misconduct connected with his work.
7. ☒ Other reason.

IMPORTANT. If the worker was separated for any reason other than No Work Available, full explanation is to be given below:

Caused or provoked a complete work stoppage in production operations of the Company on Monday morning, October 6, 194[illegible] in disregard of welfare of fellow workers and interest of Company, and in violation of contract between Company and Union.

The worker has received, or will receive Separation Pay—Yes☐ No☐ The worker will receive a pension under an Employee Pension Plan—Yes☐ No☐ (If either is "Yes," explain below:

Explanation:

Amount $	From	Through

Prepare This Form in Triplicate—Distribute as Follows:
Mail the Original (white) to the:
ALABAMA UNEMPLOYMENT COMPENSATION AGENCY
Department of Industrial Relations
Montgomery 3, Alabama
Give or mail the Duplicate (pink) to the worker.
Retain Triplicate (blue) for your files.

EMPLOYER NAME, ADDRESS AND STATE REGISTRATION NUMBER
Alabama Marble Company
Gantts Quarry, Ala.

I certify that the facts stated above are correct.

By _____ Signature of official

Date prepared Oct.16,1947 Title Asst.Gen. Mgr.

Excerpts From General Counsel's Exhibit 6

THIS AGREEMENT made and entered into this 7th day of November 1946, By and between ALABAMA MARBLE COMPANY, a Corporation of Gantt's Quarry, Alabama, hereinafter referred to as the COMPANY, and INTERNATIONAL ASSOCIATION of MARBLE, SLATE & STONE POLISHERS, RUBBERS & SAWYERS, TILE & MARBLE SETTERS HELPERS, and TERRAZZO WORKERS HELPERS, A. F. of L., a Labor Organization officially certified by the National Labor Relations Board, and acting for and on behalf of Local No. 133, hereinafter referred to as the Union:

RECOGNITION:

SECTION 1: The Company hereby recognizes the Union as the sole collective Bargaining Agency, with respect to rates of pay, wages, hours, and other conditions of employment of its employees, with exception of supervisory employees, clerical employees, and draftsmen, employed in the Quarries and Plant of the Company at Gantt's Quarry, Alabama.

A. The Union agrees that the Company is vested exclusively with the management of the business, including the right to plan and direct all Plant operations; the right to establish, change or introduce new or improved production methods, standards and facilities; the right to hire new employees, to promote, demote, transfer, discipline, and discharge for just cause.

B. It is mutually agreed that there shall be no discrimination by the Company, nor by the Union, against any member of official of the Union, or against any employee of the Company, because of his membership in the Union.

C. It is mutually agreed that, during the term of this Agreement, there shall be no lock-out by the Company, nor shall there be any slow-down or work-stoppage by the Union until after all the provisions of the grievance procedure have been complied with.

• • •

Excerpts From General Counsel's Exhibit 6

ARTICLE 5

Grievance Procedure:

A. The Company will recognize a Grievance Committee of not more than five (5) employees, or less than two (2) employees duly elected by the Union to settle grievances

that may arise during the life of this Agreement. A list of said committee will be given to the Company and twenty-four (24) hours' notice must be given of any changes in the committee.

B. An attempt will be made by both parties to expedite the settlement of all grievances that may arise, and not more than five (5) days' time will be used to render a written decision on any case in any of the following steps, with the exception of when any case goes to arbitration as set out below:

Step One: All grievances shall be presented in writing to the Foreman of the department involved by the Union Shop Steward and signed by the aggrieved employee.

Step Two: Between the grievance committee and the superintendent of the plant.

Step Three: Between the Union Committee, representatives of the International Union, or the American Federation of Labor, and representatives of the Company.

Step Four: In the event that any dispute, except wages and classifications which are not subjects for arbitration, cannot be settled in the above manner, the Company shall designate one person and the Union shall designate one person and these two persons shall select a third person who shall act as chairman. In the event that the third person cannot be agreed upon in two days, then a third person shall be selected by the two persons from a list of arbitrators furnished by the Director of U. S. Conciliation Service, and such arbitration board will hear evidence and make a decision on the disputed matter. Such decision will be made and rendered within ten (10) days and shall be final and binding on both parties. The expense for the third member of the arbitration board shall be borne equally by the Company and the Union.

* * *

Respondent's Exhibit 18

October 13, 1947

I, (s) C. W. O'Neal, hereby certify that the following is true:

On Monday, October 6, 1947, I was working at the Quarry. My job is that of Broach Help. I saw W. A. Adams motion for the men to come out of the Quarry. I came out of the Quarry and was told by that to go to polishing shop to see what was going to be done—told to clock out.

I would not have come out of the Quarry or left my job on my own accord or without such instructions.

Dated October 13, 1947.

(s) C. W. O'Neal

(S) W. C. Kinser

Respondent's Exhibit 19

October 13, 1947

I, A. J. Carden, hereby certify that the following is true:

On Monday, October 6, 1947, I was working in the Quarry. My job is that of Mach Operator. I saw C. M. Kinser motion for the men to come out of the Quarry. I came out of the Quarry and was told by him that we would haft to clock out, until this is settled.

I would not have come out of the Quarry or left my job on my own accord or without such instructions.

Dated October 13, 1947

(s) A. J. Carden

(S) W. C. Kinser

Respondent's Exhibit 20

October 14, 1947

I, E. I. Dison, Hereby certify that the following statements are true:

On Monday, October 6, 1947, I was going about my work in the Finishing Plant. My job is that of foreman of the Coping and Bed Rubbing Department. Charles Adair came to me and told me that I would have to shut the Rubbing Beds down. I refused to do so as Charles Adair is only a checker and has no authority to issue such orders. Charles Adair left and in a few minutes approximately twenty-five men from the Hand Polishing and Boxing Area in which Charles Adair is a Checker started gathering around the Rubbing beds. At this time A. F. Ellision came to me and told me that I would have to shut down the Beds. I then ordered my men to shut down the machinery. My orders were given only to avoid possible trouble.

Dated October 13, 1947.

(s) E. I. Dison

E. I. Dison

(Seal)
(s) W. C. HURT
Notary Public
Talladega Co. Alabama.

Respondent's Exhibit 21

I, W. C. KINSER, certify that the following statements are true:

On Monday morning, October 6, 1947, while carrying out my duties as Quarry Foreman I heard Cecil M. Kinser direct W. A. Adams to call out the men in the south end of the quarry. W. A. Adams as a result of these instructions left in the direction of the south end of the quarry. Shortly thereafter the men began to come out of the south end of the quarry.

Dated October 13, 1947.

(s) W. C. KINSER

W. C. HURT
(seal) Notary Public
Talladega, County, Ala.

Respondent's Exhibit 22

October 13, 1947

I. J. W. GREEN, hereby certify that the following is true:

On Monday, October 6, 1947, I was working in the Mill. My job is that of Sawyer. W. A. (Aud) Wilson came to me and told me to shut down the gang saws.

I then did shut down the gang saws because of the instructions given by W. A. Wilson. I would not have done such on my own accord or without such instructions.

Dated October 13, 1947.

(s) J. W. GREEN X his mark
J. W. Green

(S) W. E. SORRELL Mill Foreman
(S) D. A. MCCLUSKEY Yard Foreman

☆U. S. GOVERNMENT PRINTING OFFICE: 872870 NO. 17....1950

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 140

ALABAMA MARBLE COMPANY, A CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court below (R. 287),[1] is reported at 185 F. 2d 1022. The findings of fact, conclusions of law, and order of the

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[1] The symbol "R" refers to the transcript of record; the symbol "B.A." refers to the appendix to the brief filed by the Board in the court below.

Board (R. 125-221, 252-257), are reported at 83 NLRB 1047.

JURISDICTION

The judgment of the court below was entered on January 22, 1951 (R. 288), and a petition for rehearing was denied on May 4, 1951 (R. 301). A final decree was entered May 25, 1951 (R. 301). The petition for a writ of certiorari was filed on June 23, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the record supports the Board's finding that the strike settlement agreement provided for the return to work of all strikers.

2. If so, whether petitioner, having agreed that all strikers could return to work, was precluded from urging the unprotected character of the strike as a ground for its discharge of the strike leaders over a week after work had been resumed under the strike settlement agreement, so that the discharges violated Section 8 (a) (1) and (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 18-23.

STATEMENT

A. *The facts found by the Board*

Upon charges filed by Adair, Wilson, Adams, and Kinser, sometimes referred to here as complainants, and upon the usual proceedings under Section 10 of the Act, the Board found that petitioner, which is engaged in the quarrying and processing of marble at Gault's Quarry, Alabama, had violated Section 8 (a) (1) and (3) of the Act by discharging complainants on October 16, 1947, because of their participation in a work stoppage called ten days before to protest the discharge of fellow employees. The facts found by the Board may be summarized as follows:

A contract between petitioner and the Union representing its employees[2] contained a no-strike clause and a provision for submitting disputes to arbitration (B. A. 33-34). Nevertheless, the discharge of nine hand polishers, employed in petitioner's finishing plant, on the morning of Monday, October 6, 1947, resulted in a strike by the employees (R. 144; B. A. 6). The employees who stopped work to protest the discharges were led by Adair, Wilson, Adams, and Kinser (R. 142 144; B. A. 4-5, 7-8, 12-13). General Manager King was at or near the plant during the entire day but made no effort to get the men back to work (R. 144;

[2] Local 133, International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Workers Helpers, A.F.L., herein called the Union.

B. A. 26). However, at the request of Adair, secretary-treasurer of the Union, Mitchell, an A.F.L. representative, arrived at the plant in the late afternoon accompanied by Finch, a representative of the Federal Mediation and Conciliation Service (R. 141, 144; B. A. 3, 13, 14, 18). At Finch's request, King agreed to meet with Mitchell (B. A. 26).

That evening, at a meeting of Company and Union officials including complainants Kinser, Adams, and Wilson, the parties had no difficulty reaching an agreement with respect to all employees but the nine discharged hand polishers (R. 144-145; B. A. 15-16, 27-28). Mitchell initially proposed the return to work of all employees, including the hand polishers (R. 144-145; B. A. 15). But King refused to permit the hand polishers to return to work, proposing instead to take their cases directly to arbitration (R. 144-145; B. A. 15, 27). Mitchell then asked King "if the other men could go back to work the next morning," and King replied that they could (R. 144-145; B. A. 27). Mitchell thereupon dropped his efforts to obtain the immediate return to work of the hand polishers, but persuaded King to handle their cases as grievances (R. 144-145; B. A. 15, 27-28). They agreed upon the following Saturday, October 11, 1947, as the date for the first grievance meeting (*ibid.*). King remained in the sales office while the Union negotiators reported back to the men

(B. A. 28). King testified that "about half past eight Cecil Kinser came into the office and said the men would go back to work in the morning. I said, 'all right' " (*ibid.*).

Pursuant to the strike settlement all employees except the hand-polishers returned to work on Tuesday, October 7 (R. 150; B. A. 28). Toward the end of that week, however, King decided to discharge the complainants, who had been the leaders in the October 6 strike (R. 148; B. A. 32). King admitted that the thought of discharging anyone for participation in the work stoppage had not occurred to him at the strike settlement meeting; he did not explain why he had changed his mind (*ibid.*). His decision to discharge the strike leaders was approved at a meeting of petitioner's directors held on Wednesday evening, October 15, 1947 (R. 147; B. A. 31).

The next morning, Kinser, Adams, Adair, and Wilson were discharged (R. 146; B. A. 31-32). Each man received a separation notice charging him with having "caused or provoked" the strike "in disregard of welfare of fellow workers and interest of Company" and in violation of contract (R. 146; B. A. 5-6, 32).

Petitioner, prior to giving the complainants notice of their discharge, had not indicated any intention to discipline the strike leaders or other participants in the work stoppage (R. 147-148; B. A. 32). On the contrary, petitioner had made it clear

that all the men could return to work except the discharged hand-polishers (B. A. 27), and, as noted above, all the men resumed work the day following the strike. Petitioner contended before the Board, however, that it had failed to take earlier action against the strike leaders because it was not aware of their identity. The Board noted that petitioner, when it permitted the strikers to return to work, had not reserved the right to discharge the strike leaders upon ascertaining who they were (R. 127). In addition, the Board, upon the following evidence, found as a fact that petitioner through its foremen had actual knowledge at the time of the strike of the roles played by Adair, Kinser, Adams, and Wilson as strike leaders (*ibid.*):

The work stoppage on October 6 originated in respondent's finishing plant and quickly spread to its quarry and sawmill.[3] Foreman Warren of the finishing department, shortly before starting time, notified Union Secretary Adair that the hand polishers had been discharged (R. 142; B. A. 3).[4]

[3] The finishing plant and sawmill are about one-half mile distant from the quarry (B. A. 7). Wilson, a millwright, worked at the sawmill (R. 143; B. A. 11); Adair worked as a checker and inspector in the finishing plant (R. 142; B. A. 2); Kinser operated a derrick at the quarry (R. 143; B. A. 7); and Adams worked at a blacksmith shop located near the quarry (B. A. 12).

[4] The hand-polishers had been discharged at the direction of King because they had absented themselves from work to listen to a broadcast of a World Series baseball game (R. 141-142; B. A. 22-23). At their meeting on October 15, petitioner's directors decided to offer reinstatement to all the hand-polishers except Union Committeeman Aubrey Ellison (R. 145, 147; B. A. 30-31). The Union rejected this offer when it met with petitioner later that same evening, and the parties finally agreed to

The finishing department employees began to gather as word of the discharges reached them and decided not to work until "something [was] done" about the discharges (R. 142; B. A. 4). Adair completed the work stoppage at the finishing plant by instructing Foreman Dison to shut down certain production operations (R. 256; B. A. 21).

The sawmill employees voiced approval of the work stoppage when Committeeman Wilson, who had been summoned to the finishing plant by Adair, reported back that no one was working at the plant (R. 143-144; B. A. 4, 11-12). Wilson thereupon proceeded to tell the employees who work in the sawmill to shut down operations (R. 144, 256; B. A. 12, 19, 36). He then returned to the finishing plant and joined Committeemen Kirk, Robinson, and Ellison in a decision to call a complete work stoppage (R. 142, 143; B. A. 8-9).

Union President C. M. Kinser left his place of work in the quarry when told by another employee that there was trouble in the finishing department (R. 143; B. A. 7). Upon his arrival at the finishing plant, Kinser spoke to the committeemen, and learned of their decision to call a work stoppage (R. 143; B. A. 8-9). Kinser then called upon the

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refer the matter to arbitration (R. 145-146; B. A. 17). The evidence is conflicting as to whether the arbitrators named on October 22 to consider the case of the hand-polishers were also instructed to consider the case of the discharged strike leaders (R. 148; B. A. 17-19, 23-24). In any event, the Union did not attempt to complete arbitration when the arbitrator named by it became ill a few days before its contract with petitioner expired (R. 148; B. A. 24-25).

men present, constituting a majority of the Union membership, to vote on a motion that the quarry be shut down. The motion was carried (R. 143; B. A. 8-9).

Kinser called the men out of the quarry with the help of Committeeman Adams (R. 143; B. A. 8, 10, 12-13), who was given his instructions in the presence of Quarry Foreman W. C. Kinser[5] (R. 255; B. A. 19-20). Kinser also countermanded the Foreman's directions to the men not to "clock out" (R. 255-256; B. A. 20).

Thus, as the Board found (R. 127, 255-257), Foreman W. C. Kinser was aware at the time of the strike of the role played by Adams and C. M. Kinser in the quarry shut-down; Foreman Dison was similarly aware of Adair's role in the stoppage at the finishing plant; and Wilson's role in shutting down the sawmill was a matter of common knowledge.

B. *The Board's decision and order*

The Board found that petitioner discharged Adair, Wilson, Adams, and Kinser "because of their participation in the work stoppage of October 6, 1947; and that, although the work stoppage was in breach of a no-strike clause contained in an existing contract, the [petitioner] waived or condoned such conduct by permitting them to return to

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[5] Union President C. M. Kinser and Foreman W. C. Kinser are brothers (B. A. 20).

work" (R. 126-127). The Board rejected petitioner's contention that there was no waiver because it did not know at the time of the strike settlement of the role played by the four Union officials in the work stoppage, stating that petitioner knew that the employees had engaged in a work stoppage in breach of contract, but agreed nevertheless "to permit all employees to return to work without stipulating that it reserved to itself the privilege of disciplining any participant in the work stoppage" (R. 127). The Board also found that, in any event, petitioner's foremen "had personal knowledge of the part played by the four union officers in the work stoppage at the time it occurred," and attributed such knowledge to petitioner (*ibid.*).[6]

Further finding that "the conduct of the four union officers in instigating or sponsoring the work stoppage of October 6, constituted union, as well as concerted, activity within the meaning of the Act," the Board concluded that, by discharging com-

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[6] Petitioner filed with the Board a petition for reconsideration in which it asserted, *inter alia*, that the Union at the strike settlement meeting had reserved to petitioner the right to investigate the work stoppage and "discharge any individual employee on the basis of the information gathered." Petitioner also asserted that its foremen did not have knowledge of complainants' strike role (R. 221-232). Upon an examination of the record citations submitted by petitioner at the Board's request (R. 241-251) and upon the entire record in the case, the Board concluded that petitioner's assertions were without factual basis (R. 254). On October 21, 1949, the Board denied a further motion by petitioner for reconsideration of the Board's decision and for reopening the record to take further testimony (R. 285-286).

plainants on October 16, 1947, and thereafter refusing to reinstate them, petitioner violated Section 8 (a) (3) of the Act, which prohibits discouraging membership in a labor organization by discriminatory discharge for activity on its behalf, and also violated Section 8 (a) (1) of the Act, which prohibits interfering with, restraining, or coercing employees for engaging in concerted activity for mutual aid and protection (R. 127).

The Board's order requires petitioner to cease and desist from discriminating against its employees in order to discourage membership in the Union or any other labor organization of its employees, or in any manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act; to offer Adair, Wilson, Adams, and Kinser, reinstatement with back pay; and to post an appropriate notice (R. 130-132).

ARGUMENT

1. The facts found by the Board establish that the strike settlement agreement provided for the reinstatement of all the strikers. The Board found that all the strikers did in fact resume work over a week before the discharges; that petitioner expressed no reservation as to the return of all the strikers; and that petitioner through its foremen was aware from the outset of the identity of the strike leaders. It is clear that these findings are

amply supported by the record. In any event, "granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; see also *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 491.[7]

2. Equally inappropriate for review by this Court is the single material issue involved in the thirty questions presented by the petition for certiorari.[8] For the holding that petitioner, having condoned the breach of contract in settling the strike, could not thereafter assert the illegality of

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[7] The decision of the court below was rendered prior to this Court's decision in the *Universal Camera* case. The court below apparently was of the view, however, that the Board's findings in the instant case were beyond question under the *Universal Camera* rule. The same panel of judges which sat in the instant case also heard *National Labor Relations Board* v. *Russell Mfg. Co.*, 187 F. 2d 296, argued the same day as the case at bar, and likewise decided prior to *Universal Camera*. In *Russell* the court on its own motion directed the filing of new briefs devoted to the effect of the *Universal Camera* decision on the findings in that case. 187 F. 2d 336. No similar order was entered in this case.

[8] As we believe is apparent from the facts and the Board's decision and from the petition for certiorari itself, most of the questions petitioner states (Pet. 22-29) are either redundant or irrelevant. For example, petitioner's questions 1, 5, 6, and 9 go to the originally unprotected character of the strike, which is conceded. Questions 2 and 7 raise an issue as to whether the Union refused to bargain in violation of Section 8 (b) (3); no such charge was ever filed against the Union or litigated in this proceeding, and in any event, the Union's refusal to bargain could not justify the discriminatory discharge of the employees. The question (No. 13) whether the Board must prove the Union's compliance with Section 9 (f), (g), and (h), on which this Court recently denied certiorari in *Red Rock Cola Co.* v. *National Labor Relations Board*, No. 695, October Term, 1950, is not presented here since the complaint rests upon charges filed by the individual employees and not by the Union.

the strike as a ground for discharging the Union leaders is clearly correct and—contrary to petitioner's several unsupported assertions of supposed conflicts (Pet. 30-33)—reflects the uniform position of the Board and the courts of appeals.

The courts have consistently sustained the Board's view that where employees engage in normally protected concerted activities which are in some respect unlawful (for example, a strike in breach of contract, as in the instant case), if the employer condones the unlawful aspect of the employees' conduct by resuming or continuing their employment, he waives the right to rely on that unlawful aspect as justifying a subsequent discharge for the concerted activities. The employees' conduct must thereafter be regarded as ordinary protected union or concerted activity, and a discharge therefor violates Section 8 (a) (1) and (3) of the Act. Where the employer continues "to treat the strikers as its employees,"[9] where "no question concerning the status of such employees" is raised,[10] where employees are "invited * * * to return to their old places, regardless of the [wrongful] strike,"[11] where the "breach [of agreement]

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[9] *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 886 (C. A. 1), certiorari denied, 313 U. S. 595.

[10] *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. 2d 849, 856 (C. A. 7), certiorari denied, 312 U. S. 680.

[11] *National Labor Relations Board* v. *Aladdin Industries*, 125 F. 2d 377, 382 (C. A. 7), certiorari denied, 316 U. S. 706.

was overlooked" [12]—where, in short, the parties have "wiped the slate clean" by agreeing to settle their dispute [13]—the employer may not revive the wrong he has condoned to excuse later discriminations. See also *National Labor Relations Board* v. *Mt. Clemens Pottery Co.*, 147 F. 2d 262, 267 C. A. 6); *Hoover Co.* v. *National Labor Relations Board* (C. A. 6, No. 11223), decided July 9, 1951, slip op. p. 18.

The principle of condonation, consistently followed by the Board and the courts of appeals, was applied by Congress in Section 8 (d) of the amended Act. There Congress provided that an employee who strikes during the 60-day waiting period contemplated by the subsection "shall lose his status as an employee of the employer engaged in the particular labor dispute," but that "such loss of status for such employee shall terminate if and when he is reemployed by such employer." The latter clause, under which reemployment terminates the employer's power to discharge employees for striking in violation of the statutory provision, embodies the same approach which the Board and the courts have applied to other types of illegal strikes such as sit-down strikes and strikes in breach of contract, as in the instant case.[14] No

[12] *Hazel-Atlas Glass Company* v. *National Labor Relations Board*, 127 F. 2d 109, 118 (C. A. 4).

[13] *National Labor Relations Board* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885, 887 (C. A. 2).

[14] Condonation being absent, the privilege of an employer to discharge or replace employees for striking in breach of con-

statutory addendum would have been necessary to affirm the obvious proposition that reemployment, like initial employment, creates the protected status of "employee" for the future; the explicit provision that any prior "loss of status * * * shall terminate" can only mean that reemployment puts an end to the time for allowable reprisals inflicted for past activities. Thus, Congress not only reenacted the provisions of the Act under which the Board had evolved its settled doctrine of condonation [15] (cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365-366); going further, Congress itself utilized the doctrine so that an employee's loss of protected status for engaging in a strike denounced as wrongful by the Act itself persists only "unless and until he is reemployed." S. Rep. No. 105, 80th Cong., 1st Sess., p. 24.

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tract, *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, has been upheld by the Board as a matter of course. *Scullin Steel Co.*, 65 NLRB 1294; *Joseph Dyson & Sons, Inc.*, 72 NLRB 445; *Fafnir Bearing Co.*, 73 NLRB 1008; *Copperweld Steel Co.*, 75 NLRB 188; *National Electric Products Corp.*, 80 NLRB 995. Petitioner's contention (Pet. 31) that the Board's finding of condonation in this case is inconsistent with its decision in the *National Electric Products* case is unfounded. In that case, a few employees who had struck in breach of contract were not disciplined for several days after their return to work. Unlike the present case, however, the return to work of the strikers in the *National Electric Products* case was not negotiated as part of a strike settlement, nor had the employer invited them back to work or otherwise indicated any intention to waive its privilege to discipline them for their breach of contract.

[15] Sections 1 and 8(a) (1) and (3) of the amended Act effect no presently material changes in Sections 1 and 8 (1) and (3) of the original Act.

Compelling policy considerations underlie the view of Congress, the courts of appeals, and the Board that a resumption of peaceful employment relationships should conclude the employer's right to exact penalties for past concerted activities. Section 1 of the Act announces the legislative objective to promote "practices fundamental to the friendly adjustment of industrial disputes," an objective which has led the Board from its earliest days to encourage compromise and settlement.[16] Since settlement agreements facilitate the "rapid removal" of labor disputes "from the area of possible industrial conflict" (National Labor Relations Board, First Annual Report (1936), p. 31), public policy requires the maintenance of confidence in their efficacy. Hence, where the employer enters into an agreement compromising or settling unfair labor practices, it is the Board's practice to dismiss unfair labor practice charges based on matters encompassed by the agreement.[17] The same

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[16] The substitution of amicable adjustment of disputes for formal action by the Board has become a matter of major importance in the administration of the Act. During the fiscal years 1936-1947, of 43,556 cases involving unfair labor practices, 16,323, or better than 37.4 percent, were settled before formal action. During the same period, of 57,852 cases involving representation issues, 28,161 or more than 48.7 percent, were adjusted without formal action. National Labor Relations Board, Twelfth Annual Report (1947), pp. 86-87.

[17] See, *e.g.*, *American Bakeries Co.*, 51 NLRB 937; *Corn Products Refining Co.*, 22 NLRB 824; *Wickwire Brothers*, 16 NLRB 316; *Shenandoah-Dives Mining Co.*, 11 NLRB 885. If the employer thereafter continues to violate the Act, the Board, notwithstanding the agreement, will hold him to account for all unfair labor practices committed. See, *e.g.*, *May Depart-*

policy requires that where an employer settles a strike by agreeing to the reinstatement of all the strikers in return for their abandonment of the objectives of the strike, he must abide by his agreement and cannot thereafter urge the illegality of the strike as a basis for their discharge.[18]

The *per curiam* decision below, in granting enforcement of the Board's order, plainly effectuates the policy favoring peaceful and conclusive adjustment of labor disputes. Even if the doctrine reaffirmed in this case were less obviously consonant with the Act's general objectives, its propriety would be amply demonstrated by Congress' utilization of the same policy in Section 8 (d) of the amended Act and by the uniform holdings of the other courts of appeals which have con-

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ment Stores Co., 59 NLRB 976; *Chicago Casket Co.*, 21 NLRB 235; *Harry A. Halff*, 16 NLRB 667. The Board's practice in this respect has been expressly approved by this Court. *Wallace Corporation* v. *National Labor Relations Board*, 323 U. S. 248, 253-255.

[18] Compare the doctrine developed in the common law of master and servant that where "a person is continued in employment after a material breach of contract is fully known to the employer, a waiver and condonation is presumed by the law, and such breach cannot subsequently be relied upon as sufficient cause for the discharge of the employee." *Jones* v. *Vestry of Trinity Parish*, 19 Fed. 59, 62 (C. C. W. D. N. C.); see also, *In re Nagel*, 278 Fed. 105, 110 (C. A. 2); *Remington Typewriter Co.* v. *Hall*, 22 Ala. App. 267, certiorari denied, 217 Ala. 128; *Perkins* v. *Gillett Warehouse Co.*, 149 Ark. 253; *Dube* v. *Simard*, 124 Me. 369; *Daniell* v. *Boston & Maine Railroad*, 184 Mass. 337; *Rubin* v. *International Film Co.*, 122 Misc. 413, 204 N. Y. Supp. 81; *Elliott-Greer Office Supply Co.* v. *Martin*, 54 S. W. 2d 1068 (Tex. Civ. App.); 3 Williston on Contracts, § 725 (Rev. ed.).

sidered it. We submit, therefore, that review by this Court is not warranted.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MOZART G. RATNER,
Assistant General Counsel,
FREDERICK U. REEL,
MARVIN E. FRANKEL,
Attorneys,
National Labor Relations Board.

JULY, 1951.

APPENDIX

The relevant provisions of the National Labor Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, Secs. 151, *et seq.*), are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminuation of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and the employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the

thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) of such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if

requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given

or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 999499 34

Office-Supreme Court, U. S.
FILED
AUG 18 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951.

No. 140

ALABAMA MARBLE COMPANY, a Corporation,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR ALABAMA MARBLE COMPANY, A CORPORATION, Petitioner.

JOHN J. SMITH,
Birmingham, Alabama,
Counsel for Petitioner.

No. 140

ERRATA

REPLY BRIEF FOR ALABAMA MARBLE COMPANY

A CORPORATION, Petitioner

p. 3 - line 3, delete last 3 words therein, namely: "and their defense".

p. 3 - line 4, delete first 6 words therein, namely: "of fellow workers and the Petitioner".

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 140.

ALABAMA MARBLE COMPANY, a Corporation,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR ALABAMA MARBLE COMPANY, A CORPORATION, Petitioner.

To the Honorable, the Chief Justice, Fred M. Vinson, and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

THE DISCHARGES.

THE BOARD FOUND that Adair, Wilson, Adams and Kinser were discharged by Petitioner because of their *union and concerted activities* (BRIEF FOR BOARD, p. 9). However, the Board has not informed this Court that such finding or conclusion is contrary to the understanding and reasons given by the Union and the Petitioner as such appear from the evidence on the record considered as a whole.

THE UNION MAINTAINED that Adair, Wilson, Adams and Kinser "were discharged because they did not agree with Mr. Smith and with the company on its proposal to reinstate part of the nine hand-polishers and leave one out" (ABR. 95).[1] Also, the Union consistently and repeatedly affirmed that the work stoppage (strike) on Monday, October 6, 1947, was not authorized by the Union and that the Union was not responsible for it (ABR. 86, 100, 106, 35, 21).[2]

PETITIONER MAINTAINED that for good cause it discharged Adair, Wilson, Adams and Kinser, name-

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[1] "ABR." refers to the certified APPENDIX TO BRIEF FOR RESPONDENT filed herein. "R." refers to the certified TRANSCRIPT OF RECORD filed herein.

[2] The work stoppage was unilateral action but not that of the Petitioner. The employee status of Adair, Wilson, Adams and Kinser was not automatically severed because of their misconduct on Monday, October 6, 1947. Affirmative action by the Petitioner was required. *Dorsey Trailers, Inc.*, 80 N. L. R. B. No. 89, R. 149. Such action, which was timely, occurred on October 16, 1947, when Petitioner discharged them because of their misconduct. They have not been "reemployed" within the meaning of Section 8 (d) of the Act.

ly, for their flagrant misconduct, their gross insubordination, their gross disregard for the welfare of fellow workers and the Petitioner, and their defense of fellow workers and the Petitioner, and their defiance of the Petitioner (See PETITION FOR WRIT OF CERTIORARI, pp. 9, 10). Petitioner considered Adair, Wilson, Adams and Kinser to be in the same category as Ellison, one of the discharged handpolishers (ABR. 190). Petitioner stated its position (ABR. 157-158) to the Union at the evening meeting on October 15, 1947, (ABR. 152-159), namely, that Petitioner no longer wanted as an employee any man "who is so indifferent to the interests of the men or the company" (ABR. 157). On the same occasion Petitioner told the Union that Ellison "*together with other individuals*" (ABR. 157) had "interfered with the affairs and business of the company without authority" (ABR. 157), that such "does warrant us (Petitioner) in discharging" (ABR. 158) them.

It is indeed remarkable, fantastic, unrealistic and legally untenable to credit the Board with knowing more about the real reason for the discharge of the four individual employees than either the Union or the Petitioner. The burden was upon the Board to affirmatively and by substantial evidence prove its charges that Petitioner violated Sections 8(a) (1) and (3) of the Act. *N. L. R. B. v. Reynolds International Pen Co.*, 7 C. C. A., 1947, 162 F. 2d. 680, *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, 5 C. C. A., 1941, 122 F. 2d. 433. It is submitted that, as a matter of law, the substantial evidence on the record considered as a whole

does not permit, warrant, or support the finding or conclusion of the Board that Adair, Wilson, Adams and Kinser were discharged by the Petitioner because of their union and concerted activities.

PETITIONER'S MOTIVATION.

Further, Petitioner submits that, as a matter of law, the substantial evidence on the record considered as a whole affirmatively proves that Petitioner discharged Adair, Wilson, Adams and Kinser for good cause within the meaning of Section 10(c) of the Act.[3] The Trial Examiner affirmatively found that there was no *anti-union animus* which motivated the Petitioner to discharge Adair, Wilson, Adams and Kinser.

> "The respondent (Petitioner herein) as of October 6, (1947) had not committed an unfair labor practice." (INTERMEDIATE REPORT, R. 149.)

> "While the union leaders were discharged, the circumstances under which they were released do not indicate that respondent was motivated by a desire to weaken the union's position at the bargaining table, *to destroy its majority,* or to avoid the respondent's obligation to bargain." (Emphasis supplied.) (INTERMEDIATE REPORT, R. 173.)

Because of the absence of such *anti-union animus* it was fatal error to hold that Petitioner violated either Section 8(a) (1) or (3) of the Act. The question as to

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[3] BRIEF FOR BOARD admits that Petitioner had cause for discharging Adair, Wilson, Adams and Kinser but erroneously finds or concludes that Petitioner condoned their misconduct. This same misconduct is then mystically "found or concluded" by the Board to be "union and concerted activities." This Court should not sanction or encourage the Board in its effort to use the expressions "finding or conclusion" as though they were "Aladdin's lamp" to be employed to suit the convenience of the Board.

proper discipline is a matter for the decision of the management in its discretion. *Wyamn-Gordon Co. v. N. L. R. B.*, C. C. A. 8, 153 F. 2d. 408, *N. L. R. B. v. Montgomery Ward & Co., Inc.*, C. C. A. 8, 157 F. 2d. 486. An employer may discharge an employee for any cause that seems to be proper save only as a punishment for, or discouragement of, such activities as the Act declares permissible. *Associated Press v. N. L. R. B.*, 301 U. S. 103, 81 L. Ed. 953. Membership in a union "gives no immunity" from discharge for cause. *N. L. R. B. v. Robbins Tire & Rubber Co.*, 161 F. 2d. 798, *N. L. R. B. v. Continental Pipe Line Co.*, 161 F. 2d. 302. Conceding for the moment that Petitioner was mistaken in its belief that it had good cause for discharging Adair, Wilson, Adams and Kinser, it cannot be said that such discharges were motivated by an *anti-union animus* or that such discharges had the purpose or effect of discouraging union membership or any legitimate union activity. In *Underwood Machine Co.*, 74 N. L. R. B., No. 126, the Board held that unfair punishment is not necessarily discriminatory. Petitioner submits that it acted fairly, reasonably, and was justified in discharging the four individual employees on October 16, 1947, for their respective acts of misconduct on Monday, October 6, 1947.[4] Following

[4] The handpolishers were *not summarily* disciplined (PETITION FOR WRIT OF CERTIORARI, p. 5). Before discharging Adair, Wilson, Adams and Kinser, Petitioner investigated, deliberated, satisfied itself as to the guilt of the four individual complainants, and reached its decision to discipline them, for their misconduct. Such was timely action. (PETITION FOR WRIT OF CERTIORARI, pp. 8-10). If the Board is to be judged by its rashness in the case at bar, it is clear that the Board is opposed to considered, fair conduct and would encourage hasty, snap judgment, on the spot action without knowledge of the facts or circumstances, which would be contrary to good business practices and would foster industrial unrest rather than good and peaceful industrial relations, and, hence, not effectuate, but defeat, the purposes of the Act.

the discharges of Adair, Wilson, Adams and Kinser Petitioner's representatives met and bargained with union representatives at meetings held on the following dates in 1947, namely, September 17, September 26, October 22, October 30, November 6, November 28, December 23 (R. 154-155). Such precludes any finding or conclusion by the Board that Petitioner was acting from a desire to encourage or discourage union membership or to interfere with any activity declared permissible by the Act.

BOARD'S IMPROPER INTERFERENCE.

In the case at bar the Board has used its authority as a pretext for interference with Petitioner's right to discipline its employees for cause. This Court has held that such interference by the Board is not permitted by the Act. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 1937, 81 L. Ed. 893, 916, 301 U. S. 22, 45-46. The technique or means used by the Board is to say that it finds or concludes that, during the evening meeting on October 6, 1947, there was a "strike settlement agreement" regarding those who participated in the work stoppage which occurred during that day, that at the time of such meeting Petitioner, through its foremen, was aware of the identity of the strike leaders, that Petitioner did not at such meeting express any reservation regarding its right to investigate the events during the day on Monday, October 6, 1947, satisfy itself as to the guilt or innocence of its em-

ployees, and then take disciplinary action, and, finally, that Petitioner had condoned the misconduct of Adair, Wilson, Adams and Kinser and had lost its right to discipline them for their misconduct. Petitioner does not understand or believe the law now to be that by use of the terms "finding or conclusion" the Board now has authority to interfere with Petitioner's right, in the case at bar, to discharge Adair, Wilson, Adams and Kinser for their misconduct, which is the sole reason that motivated Petitioner to discharge them. Such would be contrary to *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 1937, 81 L. Ed. 893, 301 U. S. 22, *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 83 L. Ed. 627, *N. L. R. B. v. Union Pacific Stages*, 1938, C. C. A. 9, 99 F. 2d. 153, *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, *Standard Lime & Stone Co., v. N. L. R. B.*, 1938, C. C. A. 4, 97 F. 2d. 531, *N. L. R. B. v. Robbins Tire & Rubber Co.*, C. C. A. 5, 1941, 161 F. 2d. 798, *N. L. R. B. v. Continental Pipe Line Co.*, C. C. A. 5, 1947, 161 F. 2d. 302.

THERE WAS NO STRIKE SETTLEMENT AGREEMENT.

The undisputed evidence on the record regarding the evening meeting on October 6, 1947, is found in the testimony of union representative Walter L. Mitchell [5]

[5] Mitchell testified that he was an organizer for the American Federation of Labor (ABR. 83), vice-president of his own international union (ABR. 99), and Southern Director for his international union (ABR. 99). Also, Mitchell testified that he had seven assistants over eight states (ABR. 98-99). Further, Mitchell testified that he handled for the union the negotiations that resulted in the existing contract between the Petitioner and Union (ABR. 84).

(ABR. 86-88) and Petitioner's Assistant General Manager King [6] (ABR. 177-180, 182, 201-204). Petitioner contends that, as a matter of law, the substantial evidence on the record considered as a whole does not permit, support, or warrant the finding or conclusion of the Board that there was a "strike settlement agreement" regarding those who participated in the work stoppage which occurred on Monday, October 6, 1947. When Mitchell attended this meeting he told King that he "did not know the circumstances or details of it (work stoppage, October 6, 1947) yet, and had not made an investigation, but that the Union would live up to its contract—that it was not a Union strike—that the Union would live up to its contract and order them (the men) back to work—" (ABR. 86). King expressed his resentment (ABR. 178) and such closed the discussion regarding the one day work stoppage.

As a matter of law, there was no "strike settlement agreement." [7] Mitchell informed Petitioner's representatives that he didn't know the circumstances or details of the work stoppage and had not made an investigation. Mitchell denied that it was a Union strike, recognized the Union's contractual obligation, stated

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[6] Mr. H. M. King, Petitioner's Assistant General Manager, handled the contract negotiations for the Petitioner (ABR. 100). Mitchell testified that King told him that he (King) "did not know anything about unions." (ABR. 100.) Mitchell was the expert. King was the beginner.

[7] "Agreement" is defined in 3 *C. J. S.*, pp. 356-360. In 57 *C. J.* 531 "Settlement" is defined as follows: "Act or process of adjusting or determining; an adjusting: an adjustment between persons concerning their dealings or difficulties; an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other; arrangement of difficulties; composure of doubts or differences; determination by agreement; and liquidation."

that the Union would live up to the contract and order the men back to work, and in so doing there was no legal consideration for the return of the men to work the next morning, Tuesday, October 7, 1947. Petitioner's representative relied upon Mitchell's statements. King, who was the *only* person authorized to act for or bind Petitioner in such matter, knew nothing about the particular acts of misconduct of Adair, Wilson, Adams, and Kinser when he met with representatives of the Union. Without such knowledge neither Mitchell nor King was in a position to reach an agreement regarding the events of Monday, October 6, 1947, and it is not reasonable or proper to infer that either intended to reach an agreement regarding the one day work stoppage, as distinguished from the matter concerning the discharge of the nine handpolishers.

It is undisputed that Mitchell was called to come to Petitioner's plant because of the discharge of the nine handpolishers. It is clear that the evening meeting on October 6, 1947, was for the purpose of handling the discharges of the nine handpolishers which occurred before the commencement of work on Monday, October 6, 1947. In his effort to persuade King to reemploy the nine handpolishers Mitchell said: "he felt that all of them should be lectured and reprimanded". (ABR. 178.) King told Mitchell: "No." (ABR. 178.) Mitchell then propositioned (ABR. 87) King as to whether he would permit the handpolishers to go back to work the next morning. King said: "No, they were fired and they will stay fired" (ABR. 178). Mitchell then *asked* if the other men could go back

to work the next morning and King *said* "they could" (ABR. 178).[8] Henry Douglas Robinson, a union committeeman who was called as a witness by the Board was asked about this meeting:

"Q. What was discussed at the meeting?" (ABR. 27.)

"A. The discharge of those nine men." (ABR. 27.)

W. A. Adams, one of the individual complainants, was questioned by Trial Examiner Feiler regarding the same meeting (ABR. 81-82). The questions and answers were as follows:

"Trial Examiner Feiler:

"Now. Do you remember attending the meeting on the night of October 6th?

"The Witness:

"Yes.

"Trial Examiner Feiler:

"And do you remember your testimony about discussions between Walter Mitchell and Mr. King?

"The Witness:

"Yes.

"Trial Examiner Feiler:

"*And it concerned the nine handpolishers; is that right?* (Emphasis supplied.) Witness nodded affirmatively.

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[8] Petitioner did not *invite* the men to return to work. Yet the Board would have this Court believe that Petitioner *invited* the men to return. Such is not an honest, fair, reasonable, permissible inference from the substantial evidence on the record considered as a whole. The truth is that Petitioner *permitted* the men to return to work as it was required to do by Section 1(c) of the existing collective bargaining agreement (ABR. 211-212) and Section 8(d) of the Act. Also, see *National Electric Products Corp.*, 80 N. L. R. B. 995.

"Trial Examiner Feiler:

"Were you in the meeting from the beginning until its end?

"The Witness:

"Yes, sir."

PETITIONER WRONGLY CHARGED WITH KNOWLEDGE.

The undisputed evidence on the record is that King was Petitioner's representative to whom all grievances had been and were to be presented (ABR. 29-30, 77-78, 102-103); that the custom and practice was to contact King and arrange for a meeting (ABR. 77-78); that the union admitted it should have contacted King but did not (ABR. 33, 102-103); that Petitioner's business was and is departmentalized, that particular foremen were in charge of particular departments and only had authority over employees in the particular departments over which they were foremen (ABR. 212-214, which recites Article 5 of the contract); that Petitioner's foremen "could on their own responsibility fire a man for insubordination, that is, flatly refusing to obey orders, and then in the case of a foreman being cursed out by a man under him" (ABR. 200, 201-202); that *only* King handled all other matters requiring disciplinary action (ABR. 200, 201-202, R. 272-284). Because of such circumstances Petitioner contends that, as a matter of law, it was fatal error to impute to the Petitioner any knowledge that Petitioner's foremen might have had regarding the misconduct or activities of Adair, Wilson, Adams and Kinser on October 6, 1947. This Court's attention is

called to the fact that the Trial Examiner did not find as a fact or conclude as a matter of law, that Petitioner's foremen had knowledge of the role played by Adair, Wilson, Adams and Kinser and did not impute or attribute to Petitioner any knowledge on the part of its foremen (R. 135-221; See particularly 142-151). Such finding or conclusion appeared for the first time in the Board's decision and order dated June 6, 1949 (R. 125-132) and is not supported by the substantial evidence on the record considered as a whole. The undisputed evidence is that George M. Warren was Adair's foreman (ABR. 22), that Warren was in his office at the north end of the finishing plant (ABR. 63, 64) and did not know of the misconduct or role played by Adair, Wilson, Adams or Kinser on Monday, October 6, 1947 (R. 272-275). However, without any legal or factual basis the Board finds or concludes that Warren had knowledge of Adair's activities and imputes such knowledge to the Petitioner. Such is fatal error. Even more fantastic is the Board's finding or conclusion that Willis E. Sorrell, foreman of the sawmill department, under whose supervision complainant W. A. Wilson worked (R. 275-277), had knowledge of the role played by Wilson Monday morning October 6, 1947. The record affirmatively shows that Sorrell, because of illness, was not at the plant and did not report for work until about 7:40 a. m. or 7:45 a. m., which was after the complete work stoppage occurred or was effected on Monday, October 6, 1947 (R. 276). Petitioner requested the Board to ascertain the facts but, as might now be expected, the Board refused to ascertain the facts (R. 258-286). The Board has

ignored the undisputed fact that E. I. Dison, foreman over the coping and rubbing bed departments (ABR. 129) had no authority over Adair (R. 278) and could not discipline or recommend the disciplining of Adair. However, the Board erroneously imputed to the Petitioner Dison's knowledge of Adair's conduct on Monday, October 6, 1947, namely, the fact that Adair ordered Dison to shut down the rubbing beds which were operated by Negroes (ABR. 225). W. C. (Bill) Kinser, who was a sub-foreman at the quarry and supervised complainants Adams and Cecil M. Kinser (ABR. 44, 71, 122), did not hear or see his brother, Cecil M. Kinser, or W. A. Adams call or motion the men to come out of either the north or south end of the quarry (ABR. 183). Foreman, Kinser did hear his brother, Cecil M. Kinser, tell Adams to call out the men from the south end of the quarry (ABR. 122-123) and heard his brother, Cecil M. Kinser, tell the men to clock out and go to Petitioner's finishing plant located about a half mile away (ABR. 124). Such is only piecemeal information and was not communicated by W. C. (Bill) Kinser to Petitioner's Assistant General Manager King, who was the *only* person to handle such matter, until the latter part of the week in which the work stoppage occurred on Monday, October 6, 1947. (ABR. 124-125, 183, 203-204.) Fatal error was committed in imputing such knoweldge to the Petitioner.[9]

[9] King was entitled to *all* of the facts. Competent managers (and King was one, otherwise he would not have been Petitioner's Assistant General Manager in charge of production and production personnel) "do not formulate personnel policies nor resolve disputes . . . on the basis of a hurried or partial statement of one side of the controversy." *Compania Constructora Bechtel-McCone, S. A., McDonald*, 9 C. C. A., 1946, 157 F. 2d 749, 752.

PETITIONER NOT REQUIRED TO RESERVE RIGHT TO DISCIPLINE.

In the brief submitted on behalf of the Board no authority is cited to support the Board's legal conclusion that Petitioner, at the evening meeting on October 6, 1947, was, as a matter of law required to express some reservation as to the return of all the strikers in order to be able to later discipline any participants therein for misconduct. Petitioner knows no such authority and does not believe that any such authority exists. Such is not required by Section 8 (d) of the Act or the common law principles of condonation or waiver. The right of an employer to discharge an employee for cause is the same regardless of whether the employee is a member of or officer in a union. *N. L. R. B. v. Robbins Tire & Rubber Co.*, C. C. A. 5, 1947, 161 F. 2d. 798, *N. L. R. B. v. Continental Pipe Line Co.*, 161 F. 2d. 302. Here the Board, without authority, has found or concluded contrary to the common law principles of condonation or waiver (See PETITION FOR WRIT OF CERTIORARI, p. 30). This Court's attention is called to the common law principle that, an employer, after knowledge that an employee has breached his contract of employment, may continue to accept his services, take a reasonable time in which to investigate and fully satisfy himself as to the guilt of such employee before taking any disciplinary action, i.e., waiting a reasonable time before acting will not amount to a waiver of the employer's right to discipline or a condonation of the offense committed by the employee. 18 R. C. L., Sec.

27, p. 517, *Gordon v. Dickinson,* 100 W. Va. 490, 137 S. E. 65, 44 A. L. R. 526. Petitioner contends that the common law principles of condonation or waiver have not been changed, altered or amended by the Act or Section 8(d) thereof. It is urgent and necessary that this Court rule upon such question. The substantial evidence on the record considered as a whole regarding the evening meeting on Monday, October 6, 1947, is not in conflict. Hence, whether or not there was condonation or waiver by Petitioner is an issue of law which should now be settled by this Court.

NATIONAL ELECTRIC PRODUCTS CORP.

Petitioner now calls the Court's attention to footnote 14 on pages 13 and 14 of the BRIEF FOR BOARD. There the Board tries to distinguish *National Electric Products Corp.*, 80 N. L. R. B. 995, from the case at bar. From the foregoing it is clear that the Board's attempted distinction is not valid.[10] In the case at bar there was no negotiated strike settlement agreement regarding those who participated in the work stoppage that occurred on October 6, 1947; nor did Petitioner invite its employees back to work, the fact being that they returned to work voluntarily and without any inducement from Petitioner, nor, as a matter of law, was Petitioner, at such meeting, required to reserve its right to discipline, at a later date,

[10] Petitioner submits that here the Board wants to sidetrack *National Electric Products Corp.*, which is determinative of the issues in the case at bar, because it is favorable to the Petitioner.

anyone found guilty of misconduct in connection with the events of Monday, October 6, 1947.

In The Matter of National Electric Products Corp., decided December 1, 1948, 80 N. L. R. B. 995, the effective collective bargaining agreement contained substantially the same no strike, no lock-out, and grievance procedure provisions (page 999) as found in the contract between Petitioner and the Union (ABR. 211-214). There the company discharged an individual named Marfia and such was an unfair labor practice (here Petitioner has no record of *anti-union animus* or previous or subsequent unfair labor practices). Following Marfia's discharge, he and five other employees engaged in peaceful picketing which induced some 300 employees, out of the 1200 on the day shift, to remain away from work. "2 or 3 of the 5 picketers were picketing on their own time *and worked their regular shift that afternoon; the others remained away from work in order to picket. The following week,* each of the *picketers was suspended by the Respondent* for a few days *as a penalty for the picketing.*" (Emphasis supplied.) The Board held that the company had committed no violation of Section 8(a) (1) and (3) of the Act, and dismissed the allegations of the complaint charging such violations (page 1101). The following pertinent language is found in the decision of the Board:

> "We are convinced that the concerted activity of the 5 complainants, who engaged in or induced the strike in protest against Marfia's discharge, was violative of the agreement, and, that, in accordance with

the established precedent, the respondent was privileged to discipline them for their wrongful action." (Page 999.)

"However, the (page 999) Respondent's conduct, although regrettable, does not, in our opinion, excuse the complainants' breach of their agreement. *The Act was designed to encourage collective bargaining as a substitute for strike action. The right to strike,* although protected by the Act, *may be waived by the employees* in an agreement concluded through the collective bargaining process. Thus, in our opinion there is no basis for the conclusion of our dissenting colleague that we have deprived the employees 'of a basic right' to strike, since the employees themselves waived their right to strike during the life of the agreement. As we have heretofore emphasized, *'no strike' clauses, like the one herein, are designed to forestall the use of even permissive economic weapons and to substitute settlement by collective bargaining, and tend to realize the purposes of the Act by encouraging the practice and procedure of collective bargaining rather than resort to industrial warfare. (Matter of Singer Manufacturing Company,* 24 N. L. R. B. 444, 467.) No convincing argument has been made as to how it would effectuate the expressed purposes of the Act to regard this employer's unfair labor practice as sufficient justification for overriding the *salutary objective of a 'no strike' clause.* While it may be true that in the incident case it would have been futile for the employees involved to have invoked the grievance machinery of the contract with the respect to the discriminatory discharge of Marfia, their rights were nonetheless protected by the Act, *obviating any necessity for breaching their agreement.*

"Our order herein against the Respondent remedying the discriminatory discharge of Marfia *is adequate assurance to employees that within the framework of the Act they may adhere to their agreement and at the same time be fully protected against their employer's unfair labor practices.* In our opinion, under the circumstances here present, *the purposes of the Act can best be effectuated by requiring employees to honor their 'no-strike' commitments and rely on the remedial processes of the Board.*" (Page 1000.) (Italics supplied.)

Petitioner makes the following observations in connection with *National Electric Products Corp.:*

1. There the employer had first committed an unfair labor practice which was followed by picketing. In the case at bar Petitioner had committed no unfair labor practice.

2. There certain known picketers brought about a substantial work stoppage but the Board did not charge the company with knowledge of the identity of the picketers or their conduct. In the case at bar, the Board has erroneously found or concluded that Petitioner had knowledge of the identity of the individual complainants and their respective acts of misconduct on October 6, 1947.

3. There the Board held that the company's unfair labor practice was no excuse or justification for the workers or Union breaching their collective bargaining agreement. Had Petitioner discharged or

locked out all of its striking employees as the Board now suggests to this Court it might have done (See footnote 14 on pp. 13 and 14 of Brief for Board), the Board, relying upon its decision in *National Electric Products Corp.*, could have found or concluded that Petitioner was guilty of unfair labor practices for having violated its collective bargaining agreement with the Union, Section 8(d) of the Act, and, also, Sections 8(a) (1), (3) and (5) of the Act. Petitioner submits that under the circumstances it was justified in its course of action which resulted in the timely discharge of Adair, Wilson, Adams and Kinser after it knew *all* the facts, and satisfied itself that these four individuals had been guilty of misconduct detrimental to the welfare of their fellow employees and the Petitioner. *Comapnia Constructora Bechtel McCone, S. A. v. McDonald*, 9 C. C. A., 1946, 151 F. 2d. 749, PETITION FOR WRIT OF CERTIORARI, p. 30.

4. There the Board did not hold that permitting the picketers to return to work and permitting them to work into the following week constituted condonation or waiver by the employer so as to bar its right to later discipline such picketers. However, without any basis in fact or law, the Board holds that in the case at bar the fact that Petitioner's striking employees returned to work without Petitioner reserving the right to discipline at a later date the participants therein constituted condonation or waiver by Petitioner and cut off Petitioner's right to investigate, satisfy itself as to the guilt of any of its employees, and

then take disciplinary action against those guilty of misconduct.

5. There the Court recognized that the employees waived the right to strike, that no strike clauses have a salutary objective, that compliance therewith best effectuates the purposes of the Act. In the case at bar, the Board fails to recognize or to apply each such principle. There is no basis in fact or in law for such arbitrariness, bias and unreasonableness on the part of the Board against the Petitioner. Each such principle should have been applied and, had such principles been applied, the Board would have found in favor of the Petitioner. In not doing so fatal error has been committed.

UNION REFUSED TO ARBITRATE DISCHARGES.

In its brief filed herein the Board for the first time admits, as consistently maintained by Petitioner, that the Union failed, refused, or precluded the arbitration of the discharge of Adair, Wilson, Adams and Kinser, even though it was called upon several times by the Petitioner to proceed (See footnote 4, p. 7, BRIEF FOR THE N. L. R. B. in OPPOSITION, ABR. 161-165, 104-105). Adair, Wilson, Adams and Kinser, individually and collectively, were represented by the Union and bound by the acts of the Union as their agent. Failure or refusal to arbitrate their discharges, as required by the existing collective bar-

gaining ageement and Act, was both a valid defense for Petitioner and a ground which required the Board to find for the Petitioner and to substantiate Petitioner's respective motions to dismiss, separately and severally, the complaints respectively based upon charges filed in Cases Nos. 10-CA-86, 87, 88, 93, 185. (See paragraph 5 of amended answer, R. 60-65, and paragraph 5 of the answer, R. 66-67; also, INTERMEDIATE REPORT, R. 138-139.) The decision of the United States Court of Appeals, Fifth Circuit, granting the Board's petition for the enforcement of its order perpetuates such fatal error and should be reversed by this Court. To individuals and a Union, none of whom complied with their existing collective bargaining agreement or the applicable provisions of the Act, the decision of the Court below gives a cloak of immunity. Such does not encourage collective bargaining and does not effectuate the purposes of the Act. *National Electric Products Corp.*, 80 N. L. R. B. 995, *International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board*, 69 Sup. Ct. 516, footnote 15, H. R., Rep. No. 510, 80th Cong., 1st Sess., p. 38.

BOARD'S COMPLAINT AGAINST PETITIONER BASED UPON CHARGES FILED BY UNION AND ADAIR, WILSON, ADAMS AND KINSER.

Board's brief states that "The complaint rests upon charges filed by the individual employees and not by the Union." See footnote 8, p. 11, of BRIEF FOR

THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION. This is contrary to the petition filed by the Board for the enforcement of its order (R. 1-7) and that which appears in the entire record in the Court below (R. 1-286).

The complaint issued by the Board in Case No. 10-CA-185 (R. 32-40) is based upon a charge (R. 47-49) and an amended charge (R. 29-32) filed by the Union and contains the same averments as found in the complaint (R. 22-28) based upon the charges of Adair, Wilson, Adams and Kinser (R. 13-22), *and* additional averments based upon the charges filed by the Union.

Petitioner moved to strike (R. 54-55) the averments regarding the Union (Para. IV, R. 24) found in the complaint based on the charges filed by Adair, Wilson, Adams and Kinser (R. 22-28). Erroneously this motion was overruled. Petitioner then answered the complaint in Cases Nos. 10-CA-86, 87, 88, 93 (R. 61) and the complaint in Case No. 10-CA-185 (R. 67) by averring that the Union had not complied with Sections 9(f), (g) and (h) of the *Labor Management Relations Act, 1947,* and demanded strict proof thereof (R. 61). During the entire hearing nothing was offered to show that the Union had complied with Sections 9(f), (g) and (h) of the *Labor Management Relations Act, 1947.* Because of this, and for other grounds, separately and severally, Petitioner, on several occasions moved to dismiss the complaints in all cases (10-CA-86, 87, 88, 93, 185) and these motions were denied. (R. 138-139.) Petitioner contends that Union's non-compliance with Sections 9(f), (g)

and (h) of Labor Management Relations Act, 1947, required the Trial Examiner, Board and Court below to sustain its motions to dismiss and, further, that the writ for certiorari should be granted to correct such fatal error. In addition, the Petitioner contends that the Court below erred in making any reference whatsoever to the Unions (International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers, and Terrazzo Workers Helpers, A. F. of L., and Local No. 133) in its decree enforcing the order of the Board (R. 301-304) and that such was fatal error and should now be corrected by this Court. *W. T. Rawleigh Co. v. N. L. R. B.*, 20 Commerce Clearing House Labor Cases, Paragraph 66,430. (This case does not appear yet in the official reporter.)

CASES CITED BY THE BOARD.

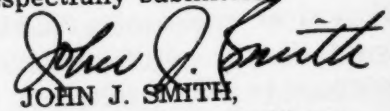
None of the cases cited in the BRIEF FOR THE BOARD have dealt with any factual situation comparable or analagous to that involved in the case at bar and, hence, are not applicable or controlling. In the Court below the Board relied almost wholly upon *National Labor Relations Board v. Aladdin Industries,* 125 F. 2d. 377 (C. A. 7), Certiorari denied, 316 U. S. 706, which is cited in footnote 11 on page 12 in BRIEF FOR THE BOARD. Petitioner submits that there was no issue of condonation or waiver before the Court in the *Aladdin* case. There the respondent's reasons for not reinstating the employees involved were as follows: A policy not to employ relatives in the same depart-

ment, incompetency, a rule not to employ married women and lack of available positions. The employer (respondent) therein did not assert that there was no strike settlement agreement and, further, did not assert its right to postpone discharge until it had fully satisfied itself as to the guilt of its employees. It follows that the part of the Court's opinion dealing with condonation or waiver is pure *dictum*. Therefore, the *Aladdin* case is no authority against the rights asserted by Petitioner in this case.

CONCLUSION.

For the reason stated in its petition and those stated hereinabove, Petitioner respectfully submits that its petition for a writ of certiorari should be granted.

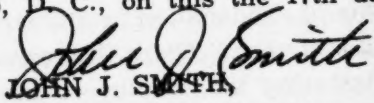
Respectfully submitted,



JOHN J. SMITH,
Counsel for Petitioner.

August, 1951.

This is to certify that five copies of this brief have been served on the Solicitor General, Department of Justice, Washington 25, D. C., on this the 17th day of August, 1951.



JOHN J. SMITH,
Counsel for Petitioner.